No. [redacted] 101

SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM—[redacted] 1925

JAMES DUIGNAN,
Petitioner,

against

UNITED STATES OF AMERICA,
PALL MALL REALTY CORPORATION,
Respondents.

PETITION AND BRIEF FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

DAVIES, AUERBACH & CORNELL,
Solicitors for Petitioner.

CHARLES H. TUTTLE,
Of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1924.

JAMES DUIGNAN (DEGNAN),
Petitioner,
against
UNITED STATES OF AMERICA, PALL MALL REALTY CORPORATION,
Respondents.

To:

EMORY R. BUCKNER, ESQ.,
United States Attorney.

LESLIE & ALDEN, ESQS.,
Solicitors for Respondents.

PLEASE TAKE NOTICE, that upon a certified transcript of the Record herein and upon the annexed petition and brief thereto attached, the undersigned, on behalf of the above-named petitioner, will present the annexed petition for a Writ of Certiorari to the Supreme Court of the United States, at the Capitol, in the City of Washington, D. C., on Monday, May 25, 1925, at the opening of Court on that day or as soon thereafter as counsel may be heard, and will ask for the relief prayed therein, and for such other and further relief as in the premises may be just.

Dated, New York, May 6th, 1925.

DAVIES, AUERBACH & CORNELL
~~CHARLES H. TUTTLE, ESQ.~~,
Solicitor for Petitioner,
34 Nassau Street,
New York City.

RECEIVED a copy of the foregoing Notice, together with the Petition for Writ of Certiorari and Brief referred to therein, this day of May, 1925.

.....
United States Attorney.

.....
Solicitors for Respondent, Pall Mall Realty Corporation.

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Index to Statutes.

Supreme Court of the United States

OCTOBER TERM, 1924.

JAMES DUIGNAN (Degnan)
Petitioner,

against

UNITED STATES OF AMERICA,
PALL MALL REALTY CORPORATION
Respondents.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, James Duignan, respectfully submits his petition for a writ of certiorari to review the decree of the United States Circuit Court of Appeals for the Second Circuit in the above-entitled case.

The Circuit Court of Appeals has affirmed a judgment rendered in the District Court for the Southern District of New York, in an action by the United States of America against the petitioner under Section 22 of Title II of the National Prohibition Act to declare that a portion of certain premises occupied by the petitioner, as tenant, was a common nuisance.

Pall Mall Realty Corporation, landlord of said premises, answered in the action, and filed a "cross-bill" to cancel and to forfeit the leases under Section 23 of Title II of the Prohibition Act, and to oust the petitioner.

The Circuit Court of Appeals has held that the petitioner's demand for a jury trial was rightly denied and that the judgment of forfeiture and ouster on the "cross-bill" was proper.

The petitioner's leases had a little more than 12 years to run at the date of the District Court's judgment. The uncontradicted evidence was that this unexpired term was of the reasonable market value of $250,000 or more (fol. 436 *et seq.*).

The Questions Involved and their Importance.

Briefly stated, the ultimate questions are these:

1. Under Section 23 of Title II of the National Prohibition Act has a Federal court of equity power and jurisdiction to declare a forfeiture of an existing lease at the suit of the landlord?

2. Since, under the constitution and laws of the State of New York, a forfeiture of an existing lease can be adjudicated only after trial by jury, could Congress constitutionally deprive the citizens of that State of that right?

3. Did the Eighteenth Amendment delegate to Congress the power to confer upon a landlord the right to cancel a lease because of the commission on the premises of an offense against the Prohibition Act?

4. Has a Federal Court (in the absence of a diversity

of citizenship) any jurisdiction to enforce a forfeiture under Section 23 of Title II of the National Prohibition Act?

5. If so, is the Federal Court bound to recognize the right of jury trial applicable to such actions in the state courts?

6. Can Section 23 of Title II have any application to leases made *prior* to the enactment of the section?

7. Was the Trial Court right in interpreting Section 23 of Title II as mandatory and as depriving it of discretion?

The far-reaching importance of these questions is obvious. As far as we can ascertain none of them has as yet been determined by this Court. They necessarily involve constitutional considerations of the utmost gravity. Proceedings by the Government to "padlock" premises where offenses against the Prohibition Act are charged to have been committed, are on the increase. The use of such proceedings by landlords to secure, by way of a cross-bill, a forfeiture of the lease itself is novel; and the decisions below sustaining this device have far-reaching consequences and involve important principles of constitutional law, particularly where (as here) the lease antedates the Prohibition Act.

Procedure for Review.

Petitioner is advised and believes that this is a case in which an appeal will lie to this Court from the decree of the Circuit Court of Appeals under Section 241 of the Judicial Code. In order, however, to avoid the possibility,—since the Prohibition Act contains criminal as well as civil provisions, and provisions which may be put into either of these categories,—of being met with the conten-

tion that an appeal does not lie, petitioner is proceeding by way of this application as well as by appeal. See *United Drug Co.* v. *Rectanus Co.*, 248 U. S. 90, 93; and *Spiller* v. *Atchison, etc., Ry. Co.*, 253 U. S., 117, 120.

The Pleadings and Judgment.

The petitioner was occupant of the basement, ground floor and three upper stories of premises 655-657 Eighth Avenue, Manhattan, New York City, under a lease and supplemental lease (Defendants' Exhibits "B" and "C," at fol. 643 *et seq.*) which provided that the premises should be "used as and for a Men's Cafe and Hotel for Men * * *." The Government's complaint alleged *only that the saloon portion of the premises* (fol. 28), "located on the ground floor and in the basement of the building," was a nuisance, and confined its prayer for abatement to that portion of the premises.

The original complaint did not make Pall Mall Realty Corporation a party. Thereafter the complaint was amended by adding the Realty Corporation as a party defendant. The Realty Corporation answered, admitting the alleged violations of the Prohibition Act by Duignan, but denying knowledge thereof or consent thereto; and by way of a "cross-bill" against Duignan alleged that the *entire* premises, both saloon and hotel, were a common nuisance within the meaning of the statute and asked for judgment cancelling and forfeiting petitioner's leases under Section 23, and directing that the petitioner "be ousted from said demised premises and that the said demised premises be repossessed by defendant Pall Mall Realty Corporation" (fol. 67).

The Government's allegation of nuisance and prayer for relief were never amended. Nevertheless, the Dis-

trict Court made its "padlock" decree to apply to both the saloon and the hotel, and entered judgment on behalf of the landlord upon its cross-bill that the petitioner's leases "be and the same hereby are forfeited and cancelled," and that within five days after the service of the judgment (fol. 15):

> "the said defendant James Duignan vacate, surrender and deliver possession of said premises to the owner in fee thereof, the defendant Pall Mall Realty Corporation; that in default of such removal a writ of assistance issue forthwith out of this court, by the clerk thereof, directed to the United States Marshal for the Southern District of New York to remove the said James Duignan from the premises and deliver possession thereof to the owner in fee thereof, Pall Mall Realty Corporation."

The Trial.

The trial, both of the Government's complaint and of the Realty Corporation's cross-bill, was had on the Equity side of the Court. The petitioner objected at the very outset of the Realty Corporation's case to the admission of any evidence in support of the Realty Corporation's cross-bill (fol. 378), but was overruled, and duly excepted.

The petitioner also moved for a jury trial (fol. 70), but his motion was denied by the Court (fol. 123). This was duly assigned as error (fol. 19).

At the end of the entire case, the petitioner again attacked the constitutionality of an interpretation of the forfeiture provision of Section 23 which would permit the landlord to procure forfeiture of the lease and ouster of the tenant by cross-bill in an equity action and without

jury trial, and moved anew to dismiss the landlord's cross-bill,—upon all of which points, however, he was overruled by the Court (fol. 600, *et seq.*).

The Facts and the Equities.

The premises in question are the Southwest corner of 42nd Street and Eighth Avenue in New York City (fol. 451). The petitioner's lease was for a term of 19 years and 11 months from June 1, 1916 to April 30, 1936, at a rent of $12,500 per year for the first two years, and of $14,000 per year for the balance of the term (fol. 641, *et seq.*). *Thus the lease was made before the adoption of the Eighteenth Amendment.*

It was testified on the trial, without contradiction, that at the time of the trial the annual rental value of the premises was $39,000 a year,—thus exceeding the rental stipulated in the lease by $24,400 per year (fol. 437).

The petitioner's testimony showed, without contradiction, that before going into possession, he had expended $62,500 in fitting the premises for use (fol. 456).

The lease provided that the premises should be used by the petitioner "as and for a Men's Cafe and Hotel for Men," and that the premises should "not be used for any other purpose, unless consented to in writing by the landlord" (fol. 646).

The interpretation placed upon this provision by the landlord itself was that it "prohibits the use of the leased premises for any purpose other than a hotel *and saloon*" (fol. 97).

The uncontradicted evidence was that in 1919, and long before any alleged violation of the Prohibition Act, the petitioner procured a sub-lessee for the entire premises, National Drug Store Company, and entered into a lease

with that Company, subject to the landlord's approval. The landlord, however, unconditionally refused to give such approval. The petitioner had the following conversation—not denied or contradicted—with the vice-president of the landlord (fol. 462, *et seq.*):

> "I asked him to let me put in some other business in the place. He said, 'No, we will get much more money for the corner.' I says, 'Well, I got the lease,' and he says, 'Yes, you got the lease, but you got a cheap lease,' and I says, 'But I spent a lot of money on this place and you are depriving me from renting this place to the National Drug Stores Company,' and he says, 'We won't let you sublet it.' Then I made an appointment to go down to the Pall Mall Realty Company, and asked them to let me put some other business in, and they refused unless I paid an exorbitant rent."

Thereupon the petitioner sought the landlord's permission to remove the saloon fixtures and to fit the premises up as a cafeteria. This, again, was unconditionally refused. The petitioner had a conversation,—which was again not denied or contradicted,—with the same officer of the landlord, on this point (fol. 469, *et seq.*):

> "Q. 39. You then had a conversation with Mr. Polognow in regard to altering the fixtures so as to make a cafeteria in the premises? A. Yes, sir.
>
> "Q. 40. When did you have that conversation? A. Shortly after that I said, 'I want to put a cafeteria in here.'
>
> "Q. 41. Did you tell him you wanted to rip out the old bar fixtures? A. Yes, sir, I told him I wanted to rip out the old bar fixtures and change it into a cafeteria, and he said, 'We won't let you do anything with it.'

"Q. 42. What did he tell you your clause in the lease was? A. That it was for a hotel and restaurant and I can't make any alterations without the written consent which is called for in the lease.

"Q. 43. Not without the written consent called for in the lease? A. No.

"Q. 44. Did you ask him to give a written consent of the Realty Company for the alterations? A. Yes, sir.

"Q. 45. What did he say? A. He wouldn't do it."

On the trial, the petitioner offered, in open court, to remodel the premises into a cafeteria and to remove all fittings having to do with the sale of liquor, if the landlord would give its consent (fol. 610). This the landlord refused, in open court.

Thereupon the petitioner offered, in open court, to stipulate that the petitioner would go out of the premises and would relet them "to a clothing store or drug store or any other line of business" having nothing to do with possible violations of the Prohibition Act, and asked the consent of the landlord, in open court, to this arrangement "as a matter of equity" (fol. 617, *et seq.*). This the landlord again refused to do.

The Government's affirmative case showed that at the very time the landlord was refusing to permit the petitioner to sublet the premises or to refit them for other than saloon purposes, the landlord was employing detectives to obtain evidence of violations of the Prohibition Act, and was going so far as to maintain private detectives, in the guise of guests, at the petitioner's hotel for that purpose (fols. 412; 383; 484). Indeed, the case against the petitioner rests preponderantly upon the testimony of these private detectives, "planted" by the landlord for the express purpose of obtaining such evidence.

The petitioner made the point on the trial that even if the matter were one properly cognizable in a court of equity, the landlord was not entitled to relief because it was itself persistently refusing to do equity; and the petitioner offered evidence in support of this defense. Of this offer the Court said (fol. 426):

> "I would like to take it, as far as that is concerned, but it seems this provision of the statute is mandatory."

At a later point in the trial the Court said further concerning this aspect of the case (fol. 603):

> "It does seem, I am quite free to admit, that this lease is of such character that it is somewhat harsh perhaps to cancel it absolutely, running, as it does, for a great many years."

The Conflict in the Decisions.

Section 22 of Title II of the Prohibition Act, under which the Government was proceeding, provides:

> "Such action shall be brought and tried as an action in equity and may be brought in any court having jurisdiction to hear and determine equity cases."

Section 23 of the same title, under which the landlord was proceeding, provides:

> "Any violation of this title upon any leased premises by the lessee or occupant thereof shall, at the option of the lessor, work a forfeiture of the lease."

There is nothing in Section 23 or anywhere else in the Act indicating in what courts or by what proceedings such

a forfeiture shall be adjudged, or that such section is intended to operate upon prior leases.

In only three reported cases, so far as this petitioner is apprised, has the question of procedure under this section been passed upon by the courts. The result has been a conflict.

In *Grossman* v. *United States*, 280 Fed. (C. C. A., 7th Circuit), 683, the Court did not discuss the constitutionality or correctness of an interpretation of Section 23 of Title II which would invest a court of equity with the power to adjudge a forfeiture, but, apparently assuming that a Federal equity court had such power, held that a cross-bill for such relief could be properly entertained, because the subject-matter is germane to that of the original bill.

The Grossman case is, so far as this petitioner is apprised, the only decision by a Circuit Court of Appeals upon this point. The other two decisions are in the District Courts, and are clearly in conflict with each other.

United States v. *Lot 29, etc., City of Omaha*, 296 Fed., 729, is a decision by Judge WOODROUGH of the District Court of Nebraska. There was no question before the Court in this case between landlord and tenant under Section 23, Title II; but upon the facts of the case the Court considered the constitutionality of both Sections 22 and 23 of Title II, and reached the conclusion that, whatever might be held in respect of such legislation when enacted by the States, it could not be sustained when enacted by the Federal Government. The Court said (p. 737):

> *"It seems to me of great importance that the constitutional question which is directly involved in this case should be presented promptly to the Supreme Court of the United States."*

United States v. *Boynton, et al.*, 297 Fed., 261, is a decision by the District Court in the Eastern District of Michigan. The Court relied solely upon the authority of the *Grossman case;* and, upon the same assumption which was made in the *Grossman case*, that the action of forfeiture could be entertained by a court of equity, the Court decided that the filing of a cross-bill was a proper practice, because germane to the main issue.

The Petitioner's Contentions.

FIRST.—The origin and history of the forfeiture provision of Section 23 of Title II show unmistakably that Congress had in mind at the time of its enactment the constitutional distinction in respect of jurisdiction between courts of law and courts of equity and the constitutional guarantee of the right to trial by jury in actions at law.

SECOND.—It is settled beyond any possible dispute, that under the Constitution and laws of New York, the defendant in an action for the recovery of real property is entitled to trial by jury, unless he has waived his right thereto in the manner prescribed by the New York statutes.

THIRD.—The forfeiture provision of Section 23 of Title II concerns only the rights of individuals in real estate. The procedure established by the several States in respect of such rights, governing their creation, tenure and termination, is binding upon the Federal Courts.

FOURTH.—There is nothing in the Eighteenth Amendment diminishing the reserved and exclusive right of the

several States to govern by local legislation the creation, tenure and termination of interests or estates in real property situated within their respective borders.

Nor is there any provision in the forfeiture clause of Section 23, Title II, which abrogates, or purports to abrogate, the statutes of the several States for the creation, tenure or termination of such rights.

Any interpretation of the forfeiture provision of Section 23, which undertakes to deprive a citizen of the State of New York of his right to a jury trial under the Constitution and statutes of that State in respect to his relation to his property, as regards another individual, condemns the provision as unconstitutional under the Tenth Amendment to the Federal Constitution.

FIFTH.—In the absence of any showing of diversity of citizenship, the District Court had no jurisdiction to try this so-called "cross-bill" between landlord and tenant.

SIXTH.—A construction of the forfeiture provision of Section 23 of Title II which deprives the defendant thereunder of the right to trial by jury condemns the provision as violative of the 7th Amendment to the Federal Constitution. Congress cannot be presumed to have intended such a result.

SEVENTH.—Whether the forfeiture provision of Section 23 of Title II be considered an action of ejectment, or of forcible entry and detainer, or of forfeiture of an estate in lands, or as a penalty for violation of the law,—and it can be but one or the other of these,—a construction of that provision which abolishes the established jurisdiction of the law courts in respect thereof, and seeks to transfer such jurisdiction to the equity side is violative

of Article III, Section 2, of the Federal Constitution, which requires Congress to recognize and maintain the distinction between cases in law and cases in equity.

EIGHTH.—In view of the established principle that equity will relieve from forfeitures but will not enforce them, it cannot be supposed that Congress intended to vest courts of equity with jurisdiction to enforce forfeitures under Section 23 of Title II,—particularly if the Section is to be construed, as apparently it was construed by the Trial Court, *as depriving the Court of discretion and as being mandatory.*

NINTH.—The leases in suit were executed April 20, 1916 and July 27, 1916, respectively. The Prohibition Act did not become a law until October 28, 1919.

The Act of Congress limits itself to legislating a new substantive covenant, by way of new ground for forfeiture, into these leases. It says nothing about *remedies* for breach, and was not intended to, and does not disturb the limitations contemplated by the parties when they executed these leases.

TENTH.—Section 23 of Title II does not operate retroactively. It does not affect leases made prior to its adoption; and under the constitution could not affect them.

ELEVENTH.—If the forfeiture provision of Section 23 of Title II can be construed as a criminal penalty for violation of the law, it is unconstitutional under the prohibition against excessive fines and cruel or unusual punishment.

TWELFTH.—The lack of jurisdiction of the Trial Court to try an action under the forfeiture provision of Section 23 of Title II was clearly raised and incorrectly decided.

Even, however, if the point had not been suggested in any manner, it was the duty of the Court, *sua sponte*, to recognize it and give it effect, and to dismiss the Realty Corporation's cross-bill for lack of jurisdiction.

United States of America,
State of New York, } ss.:
County of New York,

JAMES DUIGNAN, being duly sworn, deposes and says:

That he is the petitioner in the above entitled action; that he has read the foregoing petition and knows the contents thereof, that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

JAMES DUIGNAN.

Sworn to before me, this 5th day of May, 1925.

FRANK C. TITUS,
Notary Public.

United States of America,
Southern District of New York, } ss.:

CHARLES H. TUTTLE, being first duly sworn, deposes and says: a member of the firm of Davies, Auerbach & Lon and

That he is the attorney for the petitioner named in the foregoing petition, by him subscribed as attorney for such petitioner; that he knows the contents of such petition, and the facts therein stated are true to his knowledge.

CHARLES H. TUTTLE.

Subscribed and sworn to before me,
this 6th day of May, 1925.

FRANK C. TITUS,
Notary Public.

I HEREBY CERTIFY that I have examined and read the foregoing petition for Writ of Certiorari, and in our opinion such petition is well-founded and should be granted by this Honorable Court, and that said petition is not filed for delay.

Dated, New York, May 6th, 1925.

Respectfully submitted,

CHARLES H. TUTTLE,
Of Counsel.

FIRST POINT.

The origin and history of the forfeiture provision of Section 23 of Title II show unmistakably that Congress had in mind at the time of its enactment the constitutional distinction in respect of jurisdiction between courts of law and courts of equity and the constitutional guarantee of the right to trial by jury in actions at law.

(1) Two classic differences of power between the several States and the United States are of controlling significance in this case:

In the first place, the States may, and generally do, dispense with trial by jury in cases of petty criminal offenses, but the Government of the United States is bound absolutely by the provisions of the Sixth Amendment that in *all* criminal prosecutions or proceedings in the nature of criminal prosecutions, without regard to the degree of the offense, the accused shall enjoy the right to trial by jury.

In the second place, the States may create new equitable rights in civil actions and provide remedies for their enforcement, thereby depriving the parties of their day before a jury; but the United States is bound absolutely by the provisions of the Seventh Amendment that in any suit at common law, where the value in controversy shall exceed $20, the right of trial by jury shall be preserved, and by the provisions of Article III, Section 2 of the Federal Constitution, that the distinction between law and equity shall be maintained inviolate (see Sixth Point, pp. 27, *et seq.* of this brief).

If the forfeiture provision is criminal, quasi-criminal or penal in character, the United States is thus without

power to abrogate the right of jury trial thereunder, unless the Eighteenth Amendment is to be construed as, *pro tanto*, over-riding the provisions of the Sixth Amendment. (See Seventh Point, p. 33 of this brief.)

Whether the forfeiture provision of Section 23 of Title II is to be construed, therefore, as criminal or civil, the result must be the same, since in either event, Congress must be presumed to have enacted it with these limitations upon the power of the Federal Government in mind, and must be presumed to have intended that the right of defendants thereunder to trial by jury should be preserved.

(2) It thus becomes significant in the highest degree, that Section 23 seems clearly to have been taken from the Iowa statute, which preserves the right of jury trial, rather than from the statute books of one of the other States, following the contrary policy of abrogating that right. The only explanation can be that Congress had in mind its peculiar limitations of power in enacting this statute. See 58 Congressional Record, p. 2891, particularly the statement of Mr. Boies, of Iowa, a member of the Judiciary Committee of the 66th Congress, who defended this statute in the discussion in Congress upon the express precedent of the parent statute in his own State, Iowa.

The parent provision in the Iowa statute (Code of Iowa, 1924, Ch. 99, §2071) is as follows:

> "*Termination of Lease.* Upon a violation of any provision of this title committed upon real estate occupied by a tenant, his agent, servant, clerk, employee, or anyone claiming under him, the landlord of such premises, by himself or agent, may, in writing, notify such agent, tenant, or the person

> in possession of said leased premises, to the effect that he has terminated such lease and demands possession thereof within three days after the giving of such notice, and, after the expiration of said three days, may recover possession thereof *in an action of forcible entry and detainer*, without further notice to quit, upon proof of the violation of any provision of this title committed upon such real estate and of the giving of such notice." (Italics ours.)

It will be observed that the foregoing provision in the Iowa law gives precise definition to the action of the landlord as "an action of forcible entry and detainer." Such an action, without more, would be triable at law before a jury. (Section 8, Article I, Iowa Constitution.)

The intent of Congress, therefore, in going back to the State of Iowa, rather than to any other State, for Section 23 of Title II, can only have been to recognize and abide by the absolute duty upon Congress to preserve the right to trial by jury in such cases.

(3) A comparison of Section 22 and the abatement provision of Section 23 of Title II, with the forfeiture provision of Section 23, makes this intent even clearer. Section 22, which deals with abatement of nuisances, a recognized field of equitable jurisdiction and injunctive relief, provides expressly that the action therein contemplated "shall be brought and tried as an action in equity." The first paragraph of Section 23, which deals again with nuisances, provides expressly that persons guilty of a nuisance "may be restrained by injunction, temporary or permanent, from doing or continuing to do any of said acts or things." *The last paragraph of Section 23, however, which is the forfeiture paragraph, does not by any*

remotest suggestion undertake to provide that the action therein provided shall be had in a court of equity or shall be maintainable by injunctive procedure.

In an enactment so carefully drawn as the National Prohibition Act to avoid delays of criminal proceedings and of actions at law, by substituting wherever possible the summary proceedings of a court of equity, the mere fact that a particular provision does not, in terms, vest courts of equity with jurisdiction is almost sufficient of itself to lead to the conclusion that Congress did not intend that jurisdiction of such cases should be so vested.

SECOND POINT.

It is settled beyond dispute that under the Constitution and laws of New York the defendant in an action or counterclaim for the recovery of real property is entitled to trial by jury unless he has waived his right thereto in the manner prescribed by the New York statutes.

For many years the New York statute has continuously provided that issues of fact in an action of ejectment must be tried by a jury, unless a jury trial is waived (New York Civil Practice Act, Section 425); and even in the case of *summary proceedings* to recover possession of real property, the action is at law and the tenant is entitled absolutely to trial by jury. New York Civil Practice Act, Section 1428.

These statutes necessarily so provide, for the guaranty of trial by jury in the New York Constitution expressly preserves that right "in all cases in which it has been heretofore used."

The statutes of New York prescribe the manner in which trial by jury may be waived. Section 426 of the New York Civil Practice Act provides:

> "A party may waive his right to the trial of the issue of fact by a jury, in any of the following modes:
>
> "1. By failing to appear at the trial.
>
> "2. By filing with the clerk a written waiver signed by the attorney for the party.
>
> "3. By an oral consent in open court entered in the minutes.
>
> "4. By moving the trial of the action without a jury, or, if the adverse party so moves it, by failing to claim a trial by a jury before the production of any evidence upon the trial."

The petitioner did not waive his right to a jury trial by any one of these four enumerated modes.

On the contrary, petitioner specifically demanded trial by jury (fols. 70, 87), and the refusal of the Court (fol. 123) was duly assigned as error (fol. 19). The motion for a jury trial, which was made by the petitioner (fols. 70-2) was such a motion as would have been properly made in the state court under like circumstances. The procedure in the state courts permits joinder of actions at law and in equity (New York Civil Practice Act, Section 258); and provides for the treatment of a counterclaim as though it were a separate trial of the issues thereby presented (New York Civil Practice Act, Section 424). Where a cause of action in equity is joined with one at law, or a legal counterclaim is interposed in an action in equity, the parties may move for and procure as of right a separate jury trial of the legal issues. This was precisely what the petitioner demanded in the District Court, which was bound to gov-

ern itself by the State procedure. *Arndt* v. *Griggs*, 134 U. S., 316, 321.

THIRD POINT.

The forfeiture provision of Section 23 of Title II concerns only the rights of individuals in real estate. The procedure established by the several States in respect of such rights, governing their creation, tenure and transfer, is binding upon the Federal Courts.

The property affected by the decree in this case is situated in New York State. The petitioner's leasehold interest therein was an estate in real property under the Laws of New York. Section 240 (4) of the New York Real Property Law declares:

> "The terms 'estate' and 'interest in real property' include every such estate and interest, freehold or chattel, legal or equitable, present or future, vested or contingent."

The creation, tenure and termination of such estates are subject exclusively to the laws of the State. The United States has no power or jurisdiction in respect of such interests, or of their tenure, or of the law or procedure for their transfer or disposition.

Arndt v. *Griggs*, 134 U. S., 316, 321;
U. S. v. *Fox*, 94 U. S., 315, 320;
King, et al. v. *American Transportation Co.*, 14 Fed. Case 511; Fed. Case No. 7,787;
M'Cormick v. *Sullivant*, 10 Wheaton, 192, 202;
Beauregard v. *The City of New Orleans, et al.*, 18 How., 497;

Suydam v. *Williamson*, 24 How., 427;
Christian Union v. *Yount*, 101 U. S., 352;
Lathrop v. *Bank*, 8 Dana, 114.

The reservation of this jurisdiction to the several states *exclusively* has often been recognized by this Court.

In *Arndt* v. *Griggs*, 134 U. S., 316, 321, we read:

> "The well-being of every community requires that the title of real estate therein shall be secure, and that there be convenient and certain methods of determining any unsettled questions respecting it. *The duty of accomplishing this is local in its nature; it is not a matter of national concern or vested in the general government; it remains with the State; and as this duty is one of the State, the manner of discharging it must be determined by the State, and no proceeding which it provides can be declared invalid, unless in conflict with some special inhibitions of the Constitution, or against natural justice. So it has been held repeatedly that the procedure established by the State, in this respect, is binding upon the federal courts.*"

FOURTH POINT.

There is nothing in the Eighteenth Amendment diminishing the reserved and exclusive right of the several States to govern by local legislation the creation, tenure and termination of interests or estates in real property situated within their respective borders.

Nor is there any provision in the forfeiture clause of Section 23, Title II, which abrogates, or purports to abrogate, the statutes of the several States for the creation, tenure or termination of such rights.

Any interpretation of the forfeiture provision of Section 23, which undertakes to deprive a citizen of the State of New York of his right to a jury trial under the Constitution and statutes of that State in respect to his relation to his property, as regards another individual, condemns the provision as unconstitutional under the Tenth Amendment to the Federal Constitution.

The forfeiture provision of Section 23 declares a *consequence* without pretending to establish any *procedure* for its enforcement. It provides that for a violation of Title II, a landlord may sue to procure a forfeiture of the lease; but it does not provide that he may sue in the Federal Courts, and the rule is well settled that "the right to sue does not imply a right to sue in the courts of the union, unless it be expressed." *Bank of the United States* v. *Deveaux*, 5 Cranch., 61, 86.

No one will claim that prior to the Eighteenth Amendment, Congress could have encroached upon the reserved, exclusive right of the several states to regulate the tenure

of real property within their limits and the modes of its acquisition, transfer and termination.

Authority for such encroachment must be found, if at all, in the second section of the Eighteenth Amendment, which gives concurrent power to the two sovereignties for the enforcement of the amendment. This Court has, however, already defined the significance of the concurrent power section in language which squarely condemns the interpretation put by the lower courts on the provision we are now considering. *National Prohibition Cases*, 253 U. S., 350, 387, where it was said:

> "The power confided to Congress by that section, while not exclusive, is *territorially co-extensive* with the prohibition of the first section, embraces manufacture and other intrastate transactions as well as importation, exportation and interstate traffic, and is in no wise dependent on or affected by action or inaction on the part of the several states or any of them."

In other words, its concurrent power enables Congress to go *into* the several states, from which it had theretofore been sternly excluded, and do acts for the purpose of enforcing the Eighteenth Amendment which theretofore would have been forbidden as matters solely of local and intrastate interest and jurisdiction. It does not and cannot give Congress a blanket authority to set up within each of the States a system of jurisprudence destructive of its established system and of its constitutional limitations. In the doing of acts intrastate, Congress still remains subject to the substantive and procedural limitations of state law. The object of the concurrent power provision was not to *destroy* state sovereignty, but as clearly said in the concurring opinion of Mr. Chief Justice

White (253 U. S., at p. 391), "to *unite* national and state administrative agencies in giving effect to the Amendment."

The test of any Congressional exercise of power is the same under the Eighteenth Amendment as under any other constitutional provision: Is the exercise of power appropriate or necessary to the accomplishment of the purpose? It was expressly so declared by Mr. Chief Justice White in the *National Prohibition Cases*, 253 U. S., at page 392, in which he limited the concurrent power of Congress "to the subjects *appropriate* to execute the Amendment as defined and sanctioned by Congress."

Surely, whatever may be said for the appropriateness or necessity of the *consequence* stipulated in Section 23, there is nothing to warrant in the slightest the contention that for the accomplishment of that consequence, it was necessary that a *procedure* should be adopted overriding the principle of law, "everywhere recognized, arising from the necessity of the case," that the creation, tenure and transfer of estates in land are subject exclusively to the laws of the state in which they lie. (*United States* v. *Fox*, 94 U. S., 315, 320.)

Especially should such a construction of the Congressional enactment be avoided, when there is nothing in the act which would suggest such an intent on the part of Congress.

It was so held again in *Spencer* v. *Duplan Silk Co.*, 191 U. S., 526, 530:

> *"But a suit does not so arise unless it really and substantially involves a dispute or controversy as to the effect or construction of the Constitution, or validity or construction of the laws or treaties of the United States, upon the determination of which the result depends, and which appears in the record by plaintiff's pleading."*

(5) Clearly, also, this was not an action for the enforcement of a penalty or forfeiture within the meaning of Paragraph 9 of Section 24 of the Judicial Code.

In the first place, forfeiture is *in rem*. The *res* must be effectively seized *before* the proceeding can come into existence.

In *Dobbins's Distillery* v. *United States*, 96 U. S., 395, 396, this Court said:

> "Judicial proceedings *in rem*, to enforce a forfeiture, cannot in general be properly instituted until the property inculpated is previously seized by the executive authority, *as it is the preliminary seizure of the property that brings the same within the reach of such legal process.*"

In the second place, if Congress was using the word "forfeiture" in Section 23 in its usual acceptation under the Judicial Code, it would have provided machinery of seizure, either in an established and known form or according to some method laid down in the Act itself. In the present case, there was no preliminary seizure of the property. On the contrary, forfeiture was first declared by the decree, and seizure was directed to follow only in case the tenant did not vacate the premises.

Moreover, "condemnations and forfeitures are unknown in the practice of the United States courts, except upon specific proceedings against the property, and after the verdict of a jury." *The J. W. French*, 13 Fed., 916, 924; cited with approval in *In re Fassett*, 142 U. S., 479, 485.

In the third place, this cross-bill presents a purely private litigation between a landlord and his tenant.

In the fourth place, the cross-bill is not an action for the enforcement of a "penalty," because a penalty is a pecuniary mulct enforcible by an action of debt.

SIXTH POINT.

A construction of the forfeiture provision of Section 23 of Title II, which deprives the defendant therein of the right to trial by jury, condemns the provision as violative of the Seventh Amendment to the Federal Constitution guaranteeing trial by jury. Congress cannot be presumed to have intended such a result.

(1) The cross-bill contains no allegation that the landlord is without adequate remedy at law. It alleges repeated violations of the Prohibition Act, and the threat of their continuance; but these allegations are manifestly immaterial, since the action is not injunctive. The statute makes one past violation sufficient ground for forfeiture, and the threat of continued violations is no part of the cause of action. The cross-bill contains no allegation of fraud or other circumstance which inherently gives a court of equity power to forfeit, cancel or modify the leases in suit. The cross-bill is on its face a mere complaint in ejectment, or for dispossession of a tenant. It

contains allegations which are apt and necessary for these remedies, and no allegations whatever upon which a court of equity could inherently take or exert jurisdiction.

Admittedly, the States may by statute enlarge the equity powers of their courts, so as to create new remedies enforceable in equity. But it is settled that the Federal courts cannot even apply such statutes, and cannot proceed under them, if the enlargement is one which contravenes the distinction between law and equity as established in the Federal courts by reason of the Seventh Amendment, and deprives litigants of their constitutional right to trial by jury.

Scott v. *Neely*, 140 U. S., 106, 109;
Cates v. *Allen*, 149 U. S., 451;
Pusey & Jones v. *Hanssen*, 261 U. S., 491.

In the first of these cases, this Court said:

> "The general proposition, as to the enforcement in the Federal courts of new equitable rights created by the States, is undoubtedly correct, subject, however, to this qualification, that such enforcement does not impair any right conferred, or conflict with any inhibition imposed, by the Constitution or laws of the United States. Neither such right nor such inhibition can be in any way impaired, however fully the new equitable right may be enjoyed or enforced in the States by whose legislation it is created. The Constitution, in its Seventh Amendment, declares that 'in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.' In the Federal courts this right cannot be dispensed with, except by the assent of the parties entitled to it, nor can it be impaired by any

> blending with a claim, properly cognizable at law, of a demand for equitable relief in aid of the legal action or during its pendency. Such aid in the Federal courts must be sought in separate proceedings, to the end that the right to a trial by a jury in the legal action may be preserved intact."

In *Whitehead* v. *Shattuck*, 138 U. S., 146, the general principle of the Scott case was again affirmed, and a rule laid down which is squarely applicable to our case (p. 151):

> "It would be difficult, and perhaps impossible, to state any general rule which would determine, in all cases, what should be deemed a suit in equity as distinguished from an action at law, for particular elements may enter into consideration which would take the matter from one court to the other; *but this may be said, that, where an action is simply for the recovery and possession of specific real or personal property, or for the recovery of a money judgment, the action is one at law. An action for the recovery of real property, including damages for withholding it, has always been of that class.* The right which in this case the plaintiff wishes to assert is his title to certain real property; the remedy which he wishes to obtain is its possession and enjoyment; and in a contest over the title both parties have a constitutional right to call for a jury."

(2) If Federal courts are inhibited by the Seventh Amendment from *merely applying* an enlargement of equitable jurisdiction created by competent State legislation, *a fortiori* are they inhibited from proceeding in violation of this Amendment in cases of claimed *original* Federal jurisdiction. It has been precisely so held in *Black* v. *Jackson*, 177 U. S., 349. The action in this case was for

a mandatory injunction for the recovery of real property, and the Supreme Court of Oklahoma Territory had held that the defendant was not entitled to trial by jury. This Court reversed the decree *upon the precise ground that the Seventh Amendment applies to and is binding upon judicial proceedings in the Territories of the United States.*

Commenting upon the suggestion that equity might properly take jurisdiction because an action of forcible entry and detainer was not sufficiently speedy, this Court said (p. 363):

> "But the same reason could be urged to justify the extraordinary remedy of a mandatory injunction in order to put a defendant out of possession, even where the plaintiff was entitled to maintain ejectment or an action in the nature of ejectment. The suggestion referred to leaves out of view the distinction made by the Constitution of the United States between cases in law and cases in equity. And it also fails to recognize the provisions of the Seventh Amendment securing the right of trial by jury in 'suits at common law' where the value in controversy exceeds twenty dollars. That Amendment, so far as it secures the right of trial by jury, applies to judicial proceedings in the Territories of the United States."

Squarely in point, again, is *Killian* v. *Ebbinghause*, 110 U. S., 568, 572.

The present case, it is respectfully submitted, is squarely controlled by the foregoing decisions.

(3) As between this petitioner and his landlord, the only issue in this case was whether the landlord was entitled to repossess himself of the premises occupied by the petitioner. Under the Iowa statute, as has been pointed out,

the landlord would have been required to proceed by action of forcible entry and detainer, and the petitioner would have had an absolute right to jury trial. Under the New York statutes, the landlord's remedy would have been in ejectment, or its statutory equivalent, summary dispossess proceedings. In either case the action would have been at law, and the parties would have been entitled as a matter of right to trial by jury. Bringing the action in the Federal court did not destroy that right; on the contrary, it could but strengthen it beyond all attack, by reason of the Seventh Amendment. As said in the leading case of *Lewis* v. *Cocks*, 23 Wallace, 466, 470:

> "It is the universal practice of courts of equity to dismiss the bill, if it be grounded upon a merely legal title. In such case the adverse party has a constitutional right to a trial by jury."

And this is so, even if the point is not raised by demurrer, plea or answer, and is not suggested by counsel, and "notwithstanding the defendant has answered the bill, and insisted on matter of title."

Hipp v. *Babin*, 19 Howard, 271, 278;
Lewis v. *Cocks*, 23 *Wallace*, 466, 470.

SEVENTH POINT.

Whether the forfeiture provision of Section 23 of Title II be considered an action of ejectment, or of forcible entry and detainer, or of forfeiture of an estate in lands, or as a penalty for violation of the law—and it can be but one or the other of these—a construction of that provision which abolishes the established jurisdiction of the law courts in respect thereof, and seeks to transfer such jurisdiction to the equity side is violative of Article III, Section 2 of the Federal Constitution, which requires Congress to recognize and maintain the distinction between cases in law and cases in equity.

(1) If the action by a landlord to expel his tenant under the forfeiture provision of Section 23 be considered an action of ejectment,—and this is perhaps its closest equivalent in the books,—it carried with it right of trial by jury. (Section 425 of the New York Civil Practice Act).

Such an action is triable only at law and before a jury in the Federal Courts as well.

Lewis v. *Cocks*, 23 Wall., 466, 470;
Hipp v. *Babin*, 19 How., 271, 276.

(2) If the action be considered one of forcible entry and detainer (as expressly provided in the parent statute in Iowa), the right to trial by jury is equally clear, both in New York and in the Federal Courts. (*People* v. *Reed*, 11 Wend. 157, 159; N. Y. Civil Practice Act, Sections 1421 to 1428; N. Y. Real Property Law, Section 535).

(3) The absolute right to a jury trial under the New York Constitution is equally clear if the action be considered one of forfeiture. *Colon* v. *Lisk*, 153 N. Y., 188, 194.

Of the rights of a defendant in such a case in a Federal Court, Mr. Chief Justice MARSHALL said, in *The Sarah*, 8 Wheat., 391, 394:

> "In the trial of all cases of seizure, on land, the Court sits as a Court of common law. * * * In all cases at common law, the trial must be by jury."

(4) So, also, if the action is to impose a penalty for violation of the law,—though it is difficult in the utmost to to see how the action can possibly be so construed, since it is not an action of debt to mulct the defendant pecuniarily in an ascertained or ascertainable sum provided by the statute. If the action is for the recovery of a money penalty only, Section 425 of the Civil Practice Act, quoted above, governs; and as to penalties and forfeitures generally, see *Colon* v. *Lisk*, *supra*, 153 N. Y., 188.

The same thing is necessarily true in the Federal Courts, since the action is either in debt or *quasi*-criminal.

> *Boyd* v. *United States*, 116 U. S., 616, 631;
> *United States* v. *Chouteau*, 102 U. S., 603, 611;
> *Lipke* v. *Lederer*, 259 U. S., 557, 561.

(5) We have limited our consideration to these four possible interpretations of the statute, because it is inconceivable to us what other known or definable legal character the action can be given. Clearly the forfeiture provision of Section 23 and the action thereunder have nothing to do with the abatement of nuisances,—in the

first place, because the section deals with the abatement of *public* nuisances by *public officials* only, and gives no right of abatement to private individuals; and in the second place, because the landlord is not required to prove the continuance of the alleged nuisance at the time of hearing, or any threat or probability or even any possibility of its continuance, and even the voluntary prior abatement of the nuisance is no defense. Equally clear is it that the action is not for the cancellation of the lease, for none of the usual elements of such an action, such as fraud, mistake or accident need be established, but the mere fact of one past violation (*"any* violation") of the statute is sufficient. Furthermore, neither the prayer for relief nor the decree in this case is limited to mere cancellation. The relief asked and given was, on the contrary, typical of actions for the recovery of possession of real property, namely, *ouster* and *repossession.*

EIGHTH POINT.

In view of the established principle that equity will relieve from forfeitures but will not enforce them, it cannot be supposed that Congress intended to vest courts of equity with jurisdiction to enforce forfeitures under Section 23 of Title II, particularly if the section is to be construed—as, apparently, it was construed by the Trial Court—as depriving the Court of discretion and as being mandatory.

The Realty Corporation was emphatically not in court with clean hands or seeking or offering to do equity. The lease provided that the premises should be used "for a Men's Cafe and Hotel for Men" (fol. 646). The Realty

Corporation put the unwarranted interpretation upon this (fol. 97) that it "prohibits the use of the leased premises for any purpose other than a hotel and saloon."

Apparently relying upon this misinterpretation of the lease, the Realty Corporation (fol. 469) had refused the petitioner permission even to take out the saloon fixtures and to change the premises into a cafeteria, as he was clearly entitled to do. The Realty Corporation had persistently refused to permit sub-letting of the premises. The uncontradicted evidence established a situation of such a character that even the Trial Court felt (fol. 603) that "it is somewhat harsh perhaps to cancel (the lease) absolutely, running, as it does, for a great many years." But it seemed to the Court (fol. 426) that "this provision of the statute is *mandatory*"; and the Court did not think (fol. 603) that it had any discretion in the matter.

The extraordinary situation is thus presented that this statute is being interpreted so as not only to vest a court of equity with jurisdiction to declare a forfeiture, but, in addition, to deprive the Court of that element of discretion without which it is a sheer misnomer to call the proceeding one in equity.

The earlier rule was absolute and inflexible (*Marshall* v. *Vicksburg*, 15 Wall., 146, 149), that

> "Equity never, under any circumstances, lends its aid to enforce a forfeiture or penalty, or anything in the nature of either."

This rule has been somewhat relaxed; but it is still true that forfeitures are never favored. *Henderson* v. *Carbondale Coal & Coke Company*, 140 U. S., 25, 33:

> "Equity always leans against them, and only decrees in their favor when there is a full, clear and strict proof of a legal right thereto."

The reasons why equity always leans against forfeitures are peculiarly applicable to our case,—

> "because forfeitures are usually harsh and oppressive and because they can ordinarily be enforced at law." (Mr. Justice VAN DEVANTER in *Brewster* v. *Lanyon Zinc Co.*, 140 Fed., 801, 818 [8th, C. C. A.])

Congress must be presumed to have had this classic antagonism against forfeiture in mind when, in enacting this provision of Section 23, it *expressly refrained from vesting jurisdiction of actions thereunder in equity.* On the other hand, if it be contended, nevertheless, that Congress meant to vest equity with this jurisdiction, it cannot be supposed for a moment that it also intended to deprive the Court of that flexibility and discretion which has been called "the beautiful character or pervading excellence, if one may say so, of equity jurisprudence." *Story Eq. Jur.*, Section 139, quoted with approval by Mr. Justice VAN DEVANTER, in *Brewster* v. *Lanyon Zinc Company, supra*, 140 Fed., 801, 819.

In either event, the construction put upon the statute by the courts below was serious error. The question is one of frequent recurrence and grave importance. It merits the first consideration of this Court.

NINTH POINT.

Section 23 of Title II does not operate retroactively. It does not affect leases made prior to its adoption, and under the Constitution could not affect them.

(1) The petitioner's first lease for the premises was made April 20, 1916. A supplemental lease was entered into July 27, 1916. Both leases were in existence and

effect prior to the adoption of the Eighteenth Amendment and before the enactment of the National Prohibition Act.

There is nothing in the forfeiture provision of Section 23 to indicate that Congress intended it to apply to existing leases. This, of itself, is sufficient to take such leases out of the statute.

In *Shreveport* v. *Cole*, 129 U. S., 36, 43, this Court said, by Mr. Chief Justice Fuller:

> "Constitutions as well as statutes are construed to operate prospectively only, *unless, on the face of the instrument or enactment, the contrary intention is manifest beyond reasonable doubt.*"

In *City Railway Co.* v. *Citizens Railroad Co.*, 166 U. S., 557, 565, this Court said of the statute there under consideration that

> "it certainly should not be construed to act retrospectively or to affect contracts entered into prior to its passage, unless its language be so clear *as to admit of no other construction* * * *. There is always a presumption that statutes are intended to operate prospectively only * * *."

(2) Moreover, a construction of the statute, which makes it applicable to existing contracts, would condemn it as unconstitutional.

If the State of New York had enacted the legislation we are considering, it is not seriously open to dispute that as to existing contracts it would have been held unconstitutional, under the provision of Section 10, Article I, that "No state shall * * * pass any * * * law impairing the obligation of contracts."

Brine v. *Insurance Company*, 96 U. S., 627;
Barnitz v. *Beverly*, 163 U. S., 118, 122;
In re Ayers, 123 U. S., 443, 504;
State Tax on Foreign Held Bonds, 15 Wallace, 300, 320.

In the last cited case, this Court said, Mr. Justice Field writing:

> "A law which alters the terms of a contract by imposing new conditions, or dispensing with those expressed, is a law which impairs its obligations, * * *."

In *In re Ayers*, 123 U. S., 443, 505, this Court said:

> "In the case of contracts between individuals, the remedies for their enforcement or breach, in existence at the time they were entered into, are a part of the agreement itself, and constitute a substantial part of its obligation. *Louisiana* v. *New Orleans*, 102 U. S., 203. That obligation, by virtue of the provision of Article I, Section 10, of the Constitution of the United States, cannot be impaired by any subsequent state legislation. *Thus, not only the covenants and conditions of the contract are preserved, but also the substance of the original remedies for its enforcement.*"

(3) It is no answer to this difficulty to say that the act we are considering is an Act of Congress, and that Article I, Section 10 applies only to the States. In enacting this statute, Congress purported to exercise its concurrent power to enforce the Eighteenth Amendment. Otherwise Congress could no more have legislated with respect to the terms of leases and the conditions of their forfeiture than, under its power to regulate interstate commerce, it was able to regulate child labor within the several states.

Hammer v. *Dagenhart*, 247 U. S., 251. On the other hand, in exercising its power to act within the State, Congress must necessarily proceed within the same limitations which would have governed any State which had itself undertaken such legislation.

It would be monstrous to suppose that Congress has been vested with the powers of the States, without the fundamental restraints which have always accompanied them. And yet this is precisely what must be contended if the forfeiture provision of Section 23 is not only to be sustained as valid legislation, but, in addition, is made to apply to leases executed and in force before the Eighteenth Amendment and before the National Prohibition Act. As said by this Court in *Keller* v. *United States*, 213 U. S., 138, 149:

> "While the acts of Congress are to be liberally construed in order to enable it to carry into effect the powers conferred, it is equally true that prohibitions and limitations upon those powers should also be fairly and reasonably enforced."

TENTH POINT.

The leases in suit were executed April 20, 1916, and July 27, 1916, respectively. The Prohibition Act did not become a law until October 28, 1919.

The Act of Congress limits itself to legislating a new substantive covenant, by way of new ground for forfeiture, into these leases. It says nothing about remedies for breach; and it was not intended to, and it does not, disturb the limitations contemplated by the parties when they executed these leases.

Parties to a contract procure rights thereunder, of coordinate importance, to both the affirmative obligations of the contract and to the mode of enforcement in existence when the contract is made.

> *Brine* v. *Insurance Company*, 96 U. S., 627, 637;
> *Barnitz* v. *Beverly*, 163 U. S., 118, 122.

Manifestly Congress was legislating only with respect to the affirmative obligations imposed by leases, and not at all with respect to the mode or procedure for their enforcement. The forfeiture provision of Section 23 is silent as to remedies for its breach. There is nothing to indicate that Congress intended to affect the mode of enforcement in any manner whatever.

ELEVENTH POINT.

If the forfeiture provision of Section 23 of Title II can be construed as a criminal penalty for violation of the law, it is unconstitutional under the prohibition against excessive fines and cruel or unusual punishment. At least its application to the present case is unconstitutional for this reason, for it imposes a penalty of $250,000.

An officer of the United States Government who uses his position for the purpose of extortion, is subject to a maximum fine of $500.

A member of Congress who takes a bribe for procuring a contract, etc. is liable to a fine of not more than $10,000. An officer who knowingly makes a false acknowledgment may be fined not more than $2,000.

A fine of $5,000 is imposed for falsely making, forging, counterfeiting, or altering letters patent granted or purporting to be granted by the President of the United States.

Conspiracy to commit an offense against the United States is punishable by fine of not more than $10,000.

If the forfeiture provision of Section 23 can be considered a fine for violation of the National Prohibition Act, this petitioner has been fined $250,000. There is no reason under the forfeiture provision why the fine may not be several times that amount, for only the accident of the value of this lease limited the mulct to $250,000. "It is to be remembered that the question (of constitutionality) is to be determined not by what has been done under (the Act) in any particular instance, but by what may be done under and by virtue of its authority." (*Colon* v. *Lisk*, 153 N. Y., at p. 194.)

Of such a statute the aptest possible comment is the language of this Court in *Weems* v. *United States*, 217 U. S., 349, 366, *et seq.*:

> "Such penalties for such offenses amaze those who have formed their conception of the relation of a state to even its offending citizens from the practice of the American commonwealths, and believe that it is a precept of justice that punishment for crime should be graduated and proportioned to offense."

In that case a comparison was made by this Court between the penalty before the Court and pen[illegible]ies for other offenses; and it was said (p. 381):

> "And this contrast shows more than different exercises of legislative judgment. It is greater than that. It condemns the sentence in this case as cruel and unusual. It exhibits a difference between unrestrained power and that which is exercised under the spirit of constitutional limitations formed to establish justice."

TWELFTH POINT.

The lack of jurisdiction of the Trial Court to try an action under the forfeiture provision of Section 23 of Title II was clearly raised and incorrectly decided. Even, however, if the point had not been suggested in any manner, it was the duty of the Court sua sponte to recognize it and give it effect, and to dismiss the Realty Corporation's cross-bill for lack of jurisdiction.

While this action was still pending on the calendar and before trial, petitioner moved for trial by jury (fol. 70); but his motion was denied by the Court (fol. 123). At

the trial, petitioner objected to the admission of any evidence in support of the Realty Corporation's cross-bill (fol. 378), but was overruled and duly excepted. The petitioner raised the point again at the end of the entire case, but was again overruled by the Court (fol. 600, *et seq.*).

Moreover, it was apparent on the face of the bill that the action was not properly triable in equity. Hence, the Court should, of its own motion, have sent the action to the law side for trial before a jury, or dismissed the bill without prejudice.

In *Lewis* v. *Cocks*, 23 Wall., 466, 470, this Court held that an action of ejectment would have been an adequate remedy for the complainant, and directed dismissal of the bill for that reason. Mr. Justice SWAYNE said:

> "In the present case the objection was not made by demurrer, plea, or answer, nor was it suggested by counsel, nevertheless if it clearly exists it is the duty of the court *sua sponte* to recognize it and give it effect."

In *Hipp* v. *Babin*, referred to by Mr. Justice SWAYNE (19 How., 271, 276), it appeared that the jurisdiction of the court had been admitted during a litigation of more than ten years, and that no objection to the jurisdiction was raised by the pleadings or on the argument of the case in any court. Nevertheless, this Court affirmed a decree dismissing the bill, because the action was (p. 277) "in substance and legal effect, an ejectment bill." The Court quoted as applicable authority Section 16 of the Judiciary Act of 1789, now Section 267 of the Judicial Code, with only an immaterial change of a few words:

> "Suits in equity shall not be sustained in any

> court of the United States in any case where a plain, adequate, and complete remedy may be had at law."

And the obligation upon the Federal Courts to take cognizance, of their own motion, of the fact that the action is not properly in equity, is now embodied in Rule 22 of the New Federal Equity Rules, as follows:

> "If at any time it appear that a suit commenced in equity should have been brought as an action on the law side of the court, it shall be forthwith transferred to the law side and be there proceeded with, with only such alteration in the pleadings as shall be essential."

CONCLUSION.

The petition for writ of certiorari should be granted.

The forfeiture provision of Section 23 of Title II of the National Prohibition Act has never been construed and its validity has never been passed upon by this Court. The questions raised by the statute are highly unusual and of grave, as well as general importance. Many of them have never been before this Court for adjudication. Upon well-settled principles, therefore, the writ of certiorari should be granted.

Dated, New York, May 7th, 1925.

Respectfully submitted,

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CHARLES H. TUTTLE,
Of Counsel.

No. 101.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1926.

JAMES DUIGNAN,

Petitioner,

against

UNITED STATES OF AMERICA,
PALL MALL REALTY CORPORATION,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR JAMES DUIGNAN.

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No. 101.

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UNITED STATES OF AMERICA, and PALL MALL REALTY CORPORATION,
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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR JAMES DUIGNAN, PETITIONER.

Opinion of the Courts Below.

This was an action brought by the respondent, United States of America, to abate an alleged nuisance on premises leased by the petitioner in the Borough of Manhattan, New York City. A cross bill was filed by the respondent, Pall Mall Realty Corporation, praying for forfeiture and cancellation of the petitioner's lease of the premises in question under Section 23, Title II of the National Prohibition Act.

Judgment was rendered adjudging petitioner's premises a common nuisance and declaring forfeited and cancelling petitioner's lease (R. 2).

United States v. *Duignan*, Decree (R. 2). Opinion (R. 137).

The Circuit Court of Appeals for the Second Circuit affirmed the judgment of the District Court (R. 152) writing an opinion (R. 150). Judgment filed February 9th, 1925 (R. 152).

United States v. *Duignan*, 4 Fed. (2nd Series) 983 (S. D. N. Y.).

Grounds of Jurisdiction.

The judgment to be reviewed herein is dated March 28th, 1924 (R. 2).

The complaint of the United States alleged the maintenance of a common nuisance on the premises occupied by the petitioner. The original complaint did not make the respondent Pall Mall Realty Corporation a defendant, but it was amended by adding the realty corporation. The corporation answered admitting the allegations of the complaint and, by way of cross-bill against the petitioner, alleged that the premises were a common nuisance and asked judgment under Section 23, Title II of the National Prohibition Act declaring forfeited and cancelling the petitioner's lease of the premises in question. The petitioner answered denying the allegations of the complaint and duly moved for a jury trial (R. 12). The Court denied this motion (R. 21). At the very outset of the realty corporation's case the petitioner objected to the admission of any evidence in support of its demand for forfeiture and cancellation of petitioner's lease (R. 81), on the ground that the statute involved, Section 23, Title II, deprived petitioner of his property without due process of law (R. 92).

Briefly stated, the ultimate questions are these:

1. Under Section 23 of Title II of the National Prohibition Act has a Federal court of equity power and jurisdiction to declare a forfeiture of an existing lease at the suit of the landlord?

2. Since, under the constitution and laws of the State of New York, a forfeiture of an existing lease can be adjudicated only after trial by jury, could Congress constitutionally deprive the citizens of that State of that right?

3. Did the Eighteenth Amendment delegate to Congress the power to confer upon a landlord the right to cancel a lease because of the commission on the premises of an offense against the Prohibition Act?

4. Has a Federal Court (in the absence of a diversity of citizenship) any jurisdiction to enforce a forfeiture under Section 23 of Title II of the National Prohibition Act?

5. If so, is the Federal Court bound to recognize the right of jury trial applicable to such actions in the state courts?

6. Can Section 23 of Title II have any application to leases made *prior* to the enactment of the section?

7. Was the Trial Court right in interpreting Section 23 of Title II as mandatory and as depriving it of discretion?

The far-reaching importance of these questions is obvious. As far as we can ascertain none of them has as yet been determined by this Court. They necessarily involve constitutional considerations of the utmost gravity. Proceedings by the Government to "padlock" premises where offenses against the Prohibition Act are charged to have been committed, are on the increase. The use of such proceedings by landlords to secure, by way of a cross-bill, a forfeiture of the lease itself is novel; and the decisions below sustaining this device have far-reaching consequences and involve important principles of constitutional law, particularly where (as here) the lease antedates the Prohibition Act.

Statement.

The complaint of the United States alleged the maintenance of a common nuisance on the premises occupied by the petitioner. These premises consist of basement, ground floor and upper stories of building Nos. 655-657 Eighth Avenue, Manhattan, New York City, in that intoxocating liquors were sold on said premises in alleged violations of Title I and II of the National Prohibition Act (R. 5). Complaint alleged only that the saloon portion of the premises "located on the ground floor and in the basement of the building" was a nuisance (R. 5), and confined its prayer for abatement to that portion of the premises (R. 6). The realty corporation in its answer admitted the allegations of the complaint and, by way of cross-bill against the petitioner, alleged that the *entire* premises, both saloon and hotel, were a common nuisance, and asked judgment declaring forfeited and cancelling the petitioner's lease, and asking that the petitioner be ousted from the premises and that the Pall Mall Realty Corporation be repossessed of the same (R. 9). The Government's allegations of nuisance and prayer for relief were never amended. In spite of this fact the District Court made its padlock decree apply to both saloon and hotel.

The trial, both of the Government's complaint and of the Realty Corporation's cross-bill, was had on the Equity side of the Court. The petitioner objected at the very outset of the Realty Corporation's case to the admission of any evidence in support of the Realty Corporation's cross-bill (R. 81), but was overruled, and duly excepted.

The petitioner also moved for a jury trial (R. 12), but his motion was denied by the Court (R. 21). This was duly assigned as error (R. 3).

At the end of the entire case, the petitioner again attacked the constitutionality of an interpretation of the forfeiture provision of Section 23 which would permit the landlord to procure forfeiture of the lease and ouster of the tenant by cross-bill in an equity action and without jury trial, and

moved anew to dismiss the landlord's cross-bill,—upon all of which points, however, he was overruled by the Court (R. 133, *et seq.*).

The premises in question are the Southwest corner of 42nd Street and Eighth Avenue in New York City (R. 85). The petitioner's lease was for a term of 19 years and 11 months from June 1, 1916 to April 30, 1936, at a rent of $12,500 per year for the first two years, and of $14,000 per year for the balance of the term (R. 93, *et seq.*). *Thus the lease was made before the adoption of the Eighteenth Amendment.*

It was testified on the trial, without contradiction, that at the time of the trial the annual rental value of the premises was $39,000 a year,—thus exceeding the rental stipulated in the lease by $24,400 per year (R. 94).

The petitioner's testimony showed, without contradiction, that before going into possession, he had expended $62,500 in fitting the premises for use (R. 99).

The lease provided that the premises should be used by the petitioner "as and for a Men's Cafe and Hotel for Men," and that the premises should "not be used for any other purpose, unless consented to in writing by the landlord" (R. 96).

The interpretation placed upon this provision by the landlord itself was that it "prohibits the use of the leased premises for any purpose other than a hotel *and saloon*" (R. 94).

The uncontradicted evidence was that in 1919, and long before any alleged violation of the Prohibition Act, the petitioner procured a sub-lessee for the entire premises, National Drug Store Company, and entered into a lease with that Company, subject to the landlord's approval. The landlord, however, unconditionally refused to give such approval. The petitioner had the following conversation—not denied or contradicted—with the vice-president of the landlord (R. 100, *et seq.*):

> "I asked him to let me put in some other business in the place. He said, 'No, we will get much more money for the corner.' I says, 'Well, I got the lease,' and he

says, 'Yes, you got the lease, but you got a cheap lease,' and I says, 'But I spent a lot of money on this place and you are depriving me from renting this place to the National Drug Stores Company,' and he says, 'We won't let you sublet it.' Then I made an appointment to go down to the Pall Mall Realty Company, and asked them to let me put some other business in, and they refused unless I paid an exorbitant rent."

Thereupon the petitioner sought the landlord's permission to remove the saloon fixtures and to fit the premises up as a cafeteria. This, again, was unconditionally refused. The petitioner had a conversation,—which was again not denied or contradicted,—with the same officer of the landlord, on this point (R. 101, *et seq.*):

"Q. 39. You then had a conversation with Mr. Pologe now in regard to altering the fixtures so as to make a cafeteria in the premises? A. Yes, sir.

"Q. 40. When did you have that conversation? A. Shortly after that I said, 'I want to put a cafeteria in here.'

"Q. 41. Did you tell him you wanted to rip out the old bar fixtures? A. Yes, sir, I told him I wanted to rip out the old bar fixtures and change it into a cafeteria, and he said, 'We won't let you do anything with it.'

"Q. 42. What did he tell you your clause in the lease was? A. That it was for a hotel and restaurant and I can't make any alterations without the written consent which is called for in the lease.

"Q. 43. Not without the written consent called for in the lease? A. No.

"Q. 44. Did you ask him to give a written consent of the Realty Company for the alterations? A. Yes, sir.

"Q. 45. What did he say? A. He wouldn't do it.

On the trial, the petitioner offered, in open court, to remodel the premises into a cafeteria and to remove all fittings having to do with the sale of liquor, if the landlord would give its consent (R. 135). This the landlord refused, in open court.

Thereupon the petitioner offered, in open court, to stipu-

late that the petitioner would go out of the premises and would relet them "to a clothing store or drug store or any other line of business" having nothing to do with possible violations of the Prohibition Act, and asked the consent of the landlord, in open court, to this arrangement "as a matter of equity" (R. 135, *et seq.*). This the landlord again refused to do.

The Government's affirmative case showed that at the very time the landlord was refusing to permit the petitioner to sublet the premises or to refit them for other than saloon purposes, the landlord was employing detectives to obtain evidence of violations of the Prohibition Act, and was going so far as to maintain private detectives, in the guise of guests, at the petitioner's hotel for that purpose (R. 99, *et seq.*) Indeed, the case against the petitioner rests preponderantly upon the testimony of these private detectives, "planted" by the landlord for the express purpose of obtaining such evidence.

The petitioner made the point on the trial that even if the matter were one properly cognizable in a court of equity, the landlord was not entitled to relief because it was itself persistently refusing to do equity; and the petitioner offered evidence in support of this defense. Of this offer the Court said (fol. 426):

> "I would like to take it, as far as that is concerned, but it seems this provision of the statute is mandatory."

At a later point in the trial the Court said further concerning this aspect of the case (fol. 603):

> "It does seem, I am quite free to admit, that this lease is of such character that it is somewhat harsh perhaps to cancel it absolutely, running, as it does, for a great many years."

Section 22 of Title II of the Prohibition Act, under which the Government was proceeding, provides:

> "Such action shall be brought and tried as an action in equity and may be brought in any court having jurisdiction to hear and determine equity cases."

Section 23 of the same title, under which the landlord was proceeding, provides:

> "Any violation of this title upon any leased premises by the lessee or occupant thereof shall, at the option of the lessor, work a forfeiture of the lease."

There is nothing in Section 23 or anywhere else in the Act indicating in what courts or by what proceedings such a forfeiture shall be adjudged, or that such section is intended to operate upon prior leases.

In only three reported cases, so far as this petitioner is apprised, has the question of procedure under this section been passed upon by the courts. The result has been a conflict.

In *Grossman* v. *United States*, 280 Fed. (C. C. A., 7th Circuit), 683, the Court did not discuss the constitutionality or correctness of an interpretation of Section 23 of Title II which would invest a court of equity with the power to adjudge a forfeiture, but, apparently assuming that a Federal equity court had such power, held that a cross-bill for such relief could be properly entertained, because the subject-matter is germane to that of the original bill.

The Grossman case is, so far as this petitioner is apprised, the only decision by a Circuit Court of Appeals upon this point. The other two decisions are in the District Courts, and are clearly in conflict with each other.

United States v. *Lot 29, etc., City of Omaha*, 296 Fed. 729, is a decision by Judge WOODROUGH of the District Court of Nebraska. There was no question before the Court in this case between landlord and tenant under Section 23, Title II; but upon the facts of the case the Court considered the constitutionality of both Sections 22 and 23 of Title II, and reached the conclusion that, whatever might be held in respect of such legislation when enacted by the States, it could not be sustained when enacted by the Federal Government. The Court said (p. 737):

> *"It seems to me of great importance that the constitutional question which is directly involved in this case should be presented promptly to the Supreme Court of the United States."*

United States v. *Boynton, et al.*, 297 Fed. 261, is a decision by the District Court in the Eastern District of Michigan. The Court relied solely upon the authority of the *Grossman case;* and, upon the same assumption which was made in the *Grossman case*, that the action of forfeiture could be entertained by a court of equity, the Court decided that the filing of a cross-bill was a proper practice, because germane to the main issue.

Specification of Assigned Errors.

1. The Court erred in denying this defendant's motion for a jury trial of this action.

2. The Court erred in denying the motion of this defendant at the close of the complainant's case to dismiss the complaint on the ground that the testimony failed to show this defendant maintained a nuisance within the meaning of the

3. The Court erred in permitting the defendant landlord to submit evidence in this action to sustain its cross-bill set up in its answer.

4. The Court erred in sustaining the case of action set up in the landlord-defendant's answer because the National Prohibition Act does not provide much action by way of cross action in an equity action brought under Section 22 of that Act.

5. The Court erred in granting judgment in favor of the defendant landlord cancelling this defendant-appellant's lease.

6. The Court erred in denying the motions made at the close of the whole case on behalf of this defendant, to dismiss both defendant's cross bill and the bill of complaint.

7. The Court erred in granting judgment in favor of the defendant landlord cancelling lease of the defendant Duignan.

8. The Court erred in entering the decree against this defendant-appellant and the premises, in that the evidence clearly indicated that any nuisance that might have been found to have existed on the testimony of the complainant, was terminated before the institution of the action.

SUMMARY OF ARGUMENT.

I. The origin and history of the forfeiture provision of Section 23 of Title II show unmistakably that Congress had in mind at the time of its enactment the constitutional distinction in respect of jurisdiction between courts of law and courts of equity and the constitutional guarantee of the right to trial by jury in actions at law.

II. It is settled beyond dispute that under the Constitution and laws of New York the defendant in an action or counterclaim for the recovery of real property is entitled to trial by jury unless he has waived his right thereto in the manner prescribed by the New York Statutes.

III. The forfeiture provision of Section 23 of Title II concerns only the rights of individuals in real estate. The procedure established by the several States in respect of such rights, governing their creation, tenure and transfer, is binding upon the Federal Courts.

IV. There is nothing in the Eighteenth Amendment diminishing the reserved and exclusive right of the several States to govern by local legislation the creation, tenure and termination of interests or estates in real property situated within their respective borders.

Nor is there any provision in the forfeiture clause of Section 23, Title II, which abrogates, or purports to abrogate, the statutes of the several States for the creation, tenure or termination of such rights.

Any interpretation of the forfeiture provision of Section 23, which undertakes to deprive a citizen of the State of New York of his rights to a jury trial under the Constitution and statutes of that State in respect to his relation to his property, as regards another individual, condemns the provision as unconstitutional under the Tenth Amendment to the Federal Constitution.

V. Moreover, in the absence of any showing of diversity of citizenship, the District Court had no jurisdiction to try this action between landlord and tenant.

VI. A construction of the forfeiture provision of Section 23 of Title II which deprives the defendant therein of the right to trial by jury, condemns the provision as violative of the Seventh Amendment to the Federal Constitution guaranteeing trial by jury. Congress can not be presumed to have intended such a result.

VII. Whether the forfeiture provision of Section 23 of Title II be considered an action of ejectment, or of forcible entry and detainer, or of forfeiture of an estate in lands, or as a penalty for violation of the law—and it can be but one or the other of these—a construction of that provision which abolishes the established jurisdiction of the law courts in respect thereof, and seeks to transfer such jurisdiction to the equity side is violative of Article III, Section 2 of the Federal Constitution, which requires Congress to recognize and maintain the distinction between cases in law and cases in equity.

VIII. In view of the established principle that equity will relieve from forfeitures but will not enforce them, it cannot be supposed that Congress intended to vest courts of equity with jurisdiction to enforce forfeitures under Section 23 of Title II, particularly if the action is to be construed—as, apparently, it was construed by the trial Court—as depriving the Court of discretion and as being mandatory.

IX. Section 23 of Title II does not operate retroactively. It does not affect leases made prior to its adoption, and under the Constitution could not affect them.

X. The leases in suit were executed April 20, 1916, and July 27, 1916, respectively. The Prohibition Act did not become a law until October 28, 1919.

The Act of Congress limits itself to legislating a new substantive covenant, by way of new ground for for-

feiture, into these leases. It says nothing about remedies for breach; and it was not intended to, and it does not, disturb the limitations contemplated by the parties when they executed these leases.

XI. If the forfeiture provisions of Section 23 of Title II can be construed as a criminal penalty for violation of the law, it is unconstitutional under the prohibition against excessive fines and cruel or unusual punishment. At least its application to the present case is unconstitutional for this reason, for it imposes a penalty of $250,000.

XII. The lack of jurisdiction of the Trial Court to try an action under the forfeiture provision of Section 23 of Title II was clearly raised and incorrectly decided. Even, however, if the point had not been suggested in any manner, it was the duty of the Court sua sponte to recognize it and give it effect, and to dismiss the Realty Corporation's cross-bill for lack of jurisdiction.

ARGUMENT.

I.

The origin and history of the forfeiture provision of Section 23 of Title II show unmistakably that Congress had in mind at the time of its enactment the constitutional distinction in respect of jurisdiction between courts of law and courts of equity and the constitutional guarantee of the right to trial by jury in actions at law.

(1) Two classic differences of power between the several States and the United States are of controlling significance in this case:

In the first place, the States may, and generally do, dispense with trial by jury in cases of petty criminal offenses, but the Government of the United States is bound absolutely by the provisions of the Sixth Amendment that in *all* criminal prosecutions or proceedings in the nature of criminal prosecutions, without regard to the degree of the offense, the accused shall enjoy the right to trial by jury.

In the second place, the States may create new equitable rights in civil actions and provide remedies for their enforcement, thereby depriving the parties of their day before a jury; but the United States is bound absolutely by the provisions of the Seventh Amendment that in any suit at common law, where the value in controversy shall exceed $20, the right of trial by jury shall be preserved, and by the provisions of Article III, Section 2 of the Federal Constitution, that the distinction between law and equity shall be maintained inviolate (see Sixth Point, p. 25, *et seq.* of this brief).

If the forfeiture provision is criminal, quasi-criminal or penal in character, the United States is thus without power to abrogate the right of jury trial thereunder, unless the

Eighteenth Amendment is to be construed as, *pro tanto*, overriding the provisions of the Sixth Amendment. (See Seventh Point, p. 29 of this brief.)

Whether the forfeiture provision of Section 23 of Title II is to be construed, therefore, as criminal or civil, the result must be the same, since in either event, Congress must be presumed to have enacted it with these limitations upon the power of the Federal Government in mind, and must be presumed to have intended that the right of defendants thereunder to trial by jury should be preserved.

(2) It thus becomes significant in the highest degree, that Section 23 seems clearly to have been taken from the Iowa statute, which preserves the right of jury trial, rather than from the statute books of one of the other States, following the contrary policy of abrogating that right. The only explanation can be that Congress had in mind its peculiar limitations of power in enacting this statute. See 58 Congressional Record, p. 2891, particularly the statement of Mr. Boies, of Iowa, a member of the Judiciary Committee of the 66th Congress, who defended this statute in the discussion in Congress upon the express precedent of the parent statute in his own State, Iowa.

The parent provision in the Iowa statute (Code of Iowa, 1924, Ch. 99, § 2071) is as follows:

> "*Termination of Lease.* Upon a violation of any provision of this title committed upon real estate occupied by a tenant, his agent, servant, clerk, employee, or anyone claiming under him, the landlord of such premises, by himself or agent, may, in writing, notify such agent, tenant, or the person in possession of said leased premises, to the effect that he has terminated such lease and demands possession thereof within three days after the giving of such notice, and, after expiration of said three days, may recover possession thereof *in an action of forcible entry and detainer*, without further notice to quit, upon proof of the violation of any provision of this title committed upon such real estate and of the giving of such notice." (Italics ours.)

It will be observed that the foregoing provision in the Iowa law gives precise definition to the action of the landlord as "an action of forcible entry and detainer". Such an action, without more, would be triable at law before a jury. (Section 8, Article I, Iowa Constitution.)

The intent of Congress, therefore, in going back to the State of Iowa, rather than to any other State, for Section 23 of Title II, can only have been to recognize and abide by the absolute duty upon Congress to preserve the right to trial by jury in such cases.

(3) A comparison of Section 22 and the abatement provision of Section 23 of Title II, with the forfeiture provision of Section 23, makes this intent even clearer. Section 22, which deals with abatement of nuisances, a recognized field of equitable jurisdiction and injunctive relief, provides expressly that the action therein contemplated "shall be brought and tried as an action in equity". The first paragraph of Section 23, which deals again with nuisances, provides expressly that persons guilty of a nuisance "may be restrained by injunction, temporary or permanent, from doing or continuing to do any of said acts or things". *The last paragraph of Section 23, however, which is the forfeiture paragraph, does not by any remotest suggestion undertake to provide that the action therein provided shall be had in a court of equity or shall be maintainable by injunctive procedure.*

In an enactment so carefully drawn as the National Prohibition Act to avoid delays of criminal proceedings and of actions at law, by substituting wherever possible the summary proceedings of a court of equity, the mere fact that a particular provision does not, in terms, vest courts of equity with jurisdiction is almost sufficient of itself to lead to the conclusion that Congress did not intend that jurisdiction of such cases should be so vested.

II.

It is settled beyond dispute that under the Constitution and laws of New York the defendant in an action or counterclaim for the recovery of real property is entitled to trial by jury unless he has waived his right thereto in the manner prescribed by the New York statutes.

For many years the New York statute has continuously provided that issues of fact in an action of ejectment must be tried by a jury, unless a jury trial is waived (New York Civil Practice Act, Section 425); and even in the case of *summary proceedings* to recover possession of real property, the action is at law and the tenant is entitled absolutely to trial by jury. New York Civil Practice Act, Section 1428.

These statutes necessarily so provide, for the guaranty of trial by jury in the New York Constitution expressly preserves that right "in all cases in which it has been heretofore used".

The statutes of New York prescribe the manner in which trial by jury may be waived. Section 426 of the New York Civil Practice Act provides:

> "A party may waive his right to the trial of the issue of fact by a jury, in any of the following modes:
>
> "1. By failing to appear at the trial.
>
> "2. By filing with the clerk a written waiver signed by an attorney for the party.
>
> "3. By an oral consent in open court entered in the minutes.
>
> "4. By moving the trial of the action without a jury, or, if the adverse party so moves it, by failing to claim a trial by a jury before the production of any evidence upon the trial."

The petitioner did not waive his right to a jury trial by any one of these four enumerated modes.

On the contrary, petitioner specifically demanded trial by jury (R. 12), and the refusal of the Court (R. 21) was duly assigned as error (R. 3). The motion for a jury trial, which was made by the petitioner (R. 12) was such a motion as would have been properly made in the state court under like circumstances. The procedure in the state courts permits joinder of actions at law and in equity (New York Civil Practice Act, Section 258); and provides for the treatment of a counterclaim as though it were a separate trial of the issues thereby presented (New York Civil Practice Act, Section 424). Where a cause of action in equity is joined with one at law, or a legal counterclaim is interposed in an action in equity, the parties may move for and procure as of right a separate jury trial of the legal issues. This was precisely what the petitioner demanded in the District Court, which was bound to govern itself by the State procedure. *Arndt* v. *Griggs*, 134 U. S. 316, 321.

III.

The forfeiture provision of Section 23 of Title II concerns only the rights of individuals in real estate. The procedure established by the several States in respect of such rights, governing their creation, tenure and transfer, is binding upon the Federal Courts.

The property affected by the decree in this case is situated in New York State. The petitioner's leasehold interest therein was an estate in real property under the Laws of New York. Section 240 (4) of the New York Real Property Law declares:

> "The terms 'estate' and 'interest in real property' include every such estate and interest, freehold or chattel, legal or equitable, present or future, vested or contingent."

The creation, tenure and termination of such estates are subject exclusively to the laws of the State. The United States has no power or jurisdiction in respect of such interests, or of their tenure, or of the law or procedure for their transfer or disposition.

Arndt v. Griggs, 134 U. S. 316, 321;
U. S. v. Fox, 94 U. S. 315, 320;
King, et al. v. American Transportation Co., 14 Fed. Case, 511; Fed. Case No. 7,787;
McCormick v. Sullivant, 10 Wheaton, 192, 202;
Beauregard v. The City of New Orleans, et al., 18 How. 497;
Sugdam v. Williamson, 24 How. 427;
Christian Union v. Yount, 101 U. S. 352;
Lathrop v. Bank, 8 Dana, 114.

The reservation of this jurisdiction to the several states *exclusively* has often been recognized by this Court.

In *Arndt v. Griggs*, 134 U. S. 316, 321, we read:

> "The well-being of every community requires that the title of real estate therein shall be secure, and that there be convenient and certain methods of determining any unsettled questions respecting it. *The duty of accomplishing this is local in its nature; it is not a matter of national concern or vested in the general government; it remains with the State; and as this duty is one of the State, the manner of discharging it must be determined by the State, and no proceeding which it provides can be declared invalid, unless in conflict with some special inhibitions of the Constitution, or against natural justice. So it has been held repeatedly that the procedure established by the State, in this respect, is binding upon the federal courts.*"

IV.

There is nothing in the Eighteenth Amendment diminishing the reserved and exclusive right of the several States to govern by local legislation the creation, tenure and termination of interests or estates in real property situated within their respective borders.

Nor is there any provision in the forfeiture clause of Section 23, Title II, which abrogates, or purports to abrogate, the statutes of the several States for the creation, tenure or termination of such rights.

Any interpretation of the forfeiture provision of Section 23, which undertakes to deprive a citizen of the State of New York of his right to a jury trial under the Constitution and statutes of that State in respect to his relation to his property, as regards another individual, condemns the provision as unconstitutional under the Tenth Amendment to the Federal Constitution.

The forfeiture provision of Section 23 declares a *consequence* without pretending to establish any *procedure* for its enforcement. It provides that for a violation of Title II, a landlord may sue to procure a forfeiture of the lease; but it does not provide that he may sue in the Federal Courts, and the rule is well settled that "the right to sue does not imply a right to sue in the courts of the union, unless it be expressed". *Bank of the United States* v. *Deveaux*, 5 Cranch. 61, 86.

No one will claim that prior to the Eighteenth Amendment, Congress could have encroached upon the reserved,

exclusive right of the several states to regulate the tenure of real property within their limits and the modes of its acquisition, transfer and termination.

Authority for such encroachment must be found, if at all, in the second section of the Eighteenth Amendment, which gives concurrent power to the two sovereignties for the enforcement of the amendment. This Court has, however, already defined the significance of the concurrent power section in language which squarely condemns the interpretation put by the lower courts on the provision we are now considering. *National Prohibition Cases*, 253 U. S. 350, 387, where it was said:

> "The power confided to Congress by that section, while not exclusive, is *territorially co-extensive* with the prohibition of the first section, embraces manufacture and other intrastate transactions as well as importation, exportation and interstate traffic, and is in no wise dependent on or affected by action or inaction on the part of the several states or any of them."

In other words, its concurrent power enables Congress to go *into* the several states, from which it had theretofore been sternly excluded, and do acts for the purpose of enforcing the Eighteenth Amendment which theretofore would have been forbidden as matters solely of local and intrastate interest and jurisdiction. It does not and cannot give Congress a blanket authority to set up within each of the States a system of jurisprudence destructive of its established system and of its constitutional limitations. In the doing of acts intrastate, Congress still remains subject to the substantive and procedural limitations of state law. The object of the concurrent power provision was not to *destroy* state sovereignty, but as clearly said in the concurring opinion of Mr. Chief Justice White (253 U. S., at p. 391) "to *unite* national and state administrative agencies in giving effect to the Amendment".

The test of any Congressional exercise of power is the same under the Eighteenth Amendment as under any other

constitutional provision: Is the exercise of power appropriate or necessary to the accomplishment of the purpose? It was expressly so declared by Mr. Chief Justice White in the *National Prohibition Cases*, 253 U. S. at page 392, in which he limited the concurrent power of Congress "to the subjects *appropriate* to execute the Amendment as defined and sanctioned by Congress".

Surely, whatever may be said for the appropriateness or necessity of the *consequence* stipulated in Section 23 there is nothing to warrant in the slightest the contention that for the accomplishment of that consequence, it was necessary that a *procedure* should be adopted overriding the principle of law, "everywhere recognized, arising from the necessity of the case", that the creation, tenure and transfer of estates in land are subject exclusively to the laws of the state in which they lie. (*United States* v. *Fox*, 94 U. S. 315, 320.)

Especially should such a construction of the Congressional enactment be avoided, when there is nothing in the act which would suggest such an intent on the part of Congress.

V.

Moreover, in the absence of any showing of diversity of citizenship, the District Court had no jurisdiction to try this action between landlord and tenant.

(1) Diversity of citizenship is not pleaded, either in the complaint or in the cross-bill. There is no proof of such diversity. The Pall Mall Realty Corporation is a New York corporation (fol. 47).

(2) The mere fact that a claimed right is created by federal statute does not of itself give jurisdiction to the Federal Courts of an action to enforce such right, unless such jurisdiction is expressly conferred by the Act creating the right or by some other Act of Congress (Opinion of

Chief Justice Marshall in *Bank of the United States* v. *Deveaux*, 5 Cranch. 61, 86).

The forfeiture provision of Section 23 of Title II does not purport to vest the Federal Courts, whether at law or in equity, with jurisdiction to enforce the right which it creates. Nor is there any provision elsewhere in the National Prohibition Act giving the Federal Courts such jurisdiction.

In this respect Section 23 differs strikingly from Section 22, for in the latter, the United States is a party to the action by whomsoever the action is brought, so that the Federal Courts have jurisdiction as of course (Section 24 of the Judicial Code).

(3) Nor can the jurisdiction of the Federal Courts be enlarged by the fact that the landlord has proceeded by so-called cross-bill in a main action over which the Federal Court had jurisdiction. The jurisdiction of the Court must be tested just as though the landlord and the tenant were the only parties to the action.

In *Geneva Furniture Company* v. *Karpen*, 238 U. S. 254, 259, this Court said that

> "it hardly needs statement that the jurisdiction as limited and fixed by Congress cannot be enlarged or extended by uniting in a single suit causes of action of which the court is without jurisdiction with one of which it has jurisdiction. Upon this point the rule otherwise prevailing respecting the joinder of causes of action in suits in equity must of course yield to the jurisdictional statute."

In *Vanneman* v. *Leverett*, 31 Fed. 376, it was held (to quote the headnote):

> "Where citizens of Georgia, who are partners, are both sued in equity in the courts of the United States, one of them cannot, by cross-bill against the other, litigate their disputes *inter sese*."

See also, *Patton* v. *Marshall*, 173 Fed. C. C. A. 350, 356.

(4) Moreover, the cross-bill does not constitute a suit arising under the Constitution or laws of the United States.

In *Cooke* v. *Avery*, 147 U. S. 375, 384, it was said:

> "Whether a suit is one that arises under the Constitution or laws of the United States is determined by the questions involved. If from them it appears that some title, right, privilege or immunity on which the recovery depends will be defeated by one construction of the Constitution or a law of the United States, or sustained by the opposite construction, then the case is one arising under the Constitution or laws of the United States."

It was so held again in *Spencer* v. *Duplan Silk Co.*, 191 U. S. 526, 530:

> "*But a suit does not so arise unless it really and substantially involves a dispute or controversy as to the effect or construction of the Constitution, or validity or construction of the laws or treaties of the United States, upon the determination of which the result depends, and which appears in the record by plaintiff's pleading.*"

(5) Clearly, also, this was not an action for the enforcement of a penalty or forfeiture within the meaning of Paragraph 9 of Section 24 of the Judicial Code.

In the first place, forfeiture is *in rem*. The *res* must be effectively seized *before* the proceeding can come into existence.

In *Dobbins's Distillery* v. *United States*, 96 U. S. 395, 396, this Court said:

> "Judicial proceedings *in rem*, to enforce a forfeiture, cannot in general be properly instituted until the property inculpated is previously seized by the executive authority, *as it is the preliminary seizure of the property that brings the same within the reach of such legal process.*"

In the second place, if Congress was using the word "forfeiture" in Section 23 in its usual acceptation under the

Judicial Code, it would have provided machinery of seizure, either in an established and known form or according to some method laid down in the Act itself. In the present case, there was no preliminary seizure of the property. On the contrary, forfeiture was first declared by the decree, and seizure was directed to follow only in case the tenant did not vacate the premises.

Moreover, "condemnations and forfeitures are unknown in the practice of the United States courts, except upon specific proceedings against the property, and after the verdict of a jury". *The J. W. French*, 13 Fed. 916, 924; cited with approval in *In re Fassett*, 142 U. S. 479, 485.

In the third place, this cross-bill presents a purely private litigation between a landlord and his tenant.

In the fourth place, the cross-bill is not an action for the enforcement of a "penalty", because a penalty is a pecuniary mulct enforcible by an action of debt.

VI.

A construction of the forfeiture provision of Section 23 of Title II, which deprives the defendant therein of the right to trial by jury, condemns the provision as violative of the Seventh Amendment to the Federal Constitution guaranteeing trial by jury. Congress cannot be presumed to have intended such a result.

(1) The cross-bill contains no allegation that the landlord is without adequate remedy at law. It alleges repeated violations of the Prohibition Act, and the threat of their continuance; but these allegations are manifestly immaterial, since the action is not injunctive. The statute makes one past violation sufficient ground for forfeiture, and the threat of continued violations is no part of the cause of action. The cross-bill contains no allegation of fraud or other circum-

stance which inherently gives a court of equity power to forfeit, cancel or modify the leases in suit. The cross-bill is on its face a mere complaint in ejectment, or for dispossession of a tenant. It contains allegations which are apt and necessary for these remedies, and no allegations whatever upon which a court of equity could inherently take or exert jurisdiction.

Admittedly, the States may by statute enlarge the equity powers of their courts, so as to create new remedies enforceable in equity. But it is settled that the Federal courts cannot even apply such statutes, and cannot proceed under them, if the enlargement is one which contravenes the distinction between law and equity as established in the Federal courts by reason of the Seventh Amendment, and deprives litigants of their constitutional right to trial by jury.

Scott v. *Neely*, 140 U. S. 106, 109;
Cates v. *Allen*, 149 U. S. 451;
Pusey & Jones v. *Hanssen*, 261 U. S. 491.

In the first of these cases, this Court said:

> "The general proposition, as to the enforcement in the Federal courts of new equitable rights created by the States, is undoubtedly correct, subject, however, to this qualification, that such enforcement does not impair any right conferred, or conflict with any inhibition imposed, by the Constitution or laws of the United States. Neither such right nor such inhibition can be in any way impaired, however fully the new equitable right may be enjoyed or enforced in the States by whose legislation it is created. The Constitution, in its Seventh Amendment, declares that 'in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved'. In the Federal courts this right cannot be dispensed with, except by the assent of the parties entitled to it, nor can it be impaired by any blending with a claim, properly cognizable at law, of a demand for equitable relief in aid of the legal action or during its pendency. Such aid in the Federal courts must be sought in separate proceedings, to the end that the right to a trial by a jury in the legal action may be preserved intact."

In *Whitehead* v. *Shattuck*, 138 U. S. 146, the general principle of the *Scott* case was again affirmed, and a rule laid down which is squarely applicable to our case (p. 151):

> "It would be difficult, and perhaps impossible, to state any general rule which would determine, in all cases, what should be deemed a suit in equity as distinguished from an action at law, for particular elements may enter into consideration which would take the matter from one court to the other; *but this may be said, that, where an action is simply for the recovery and possession of specific real or personal property, or for the recovery of a money judgment, the action is one at law. An action for the recovery of real property, including damages for withholding it, has always been of that class.* The right which in this case the plaintiff wishes to assert is his title to certain real property; the remedy which he wishes to obtain is its possession and enjoyment; and in a contest over the title both parties have a constitutional right to call for a jury."

(2) If Federal courts are inhibited by the Seventh Amendment from *merely applying* an enlargement of equitable jurisdiction created by competent State legislation, *a fortiori* are they inhibited from proceeding in violation of this Amendment in cases of claimed *original* Federal jurisdiction. It has been precisely so held in *Black* v. *Jackson*, 177 U. S. 349. The action in this case was for a mandatory injunction for the recovery of real property, and the Supreme Court of Oklahoma Territory had held that the defendant was not entitled to trial by jury. This Court reversed the decree *upon the precise ground that the Seventh Amendment applies to and is binding upon judicial proceedings in the Territories of the United States.*

Commenting upon the suggestion that equity might properly take jurisdiction because an action of forcible entry and detainer was not sufficiently speedy, this Court said (p. 363):

> "But the same reason could be urged to justify the extraordinary remedy of a mandatory injunction in

order to put a defendant out of possession, even where the plaintiff was entitled to maintain ejectment or an action in the nature of ejectment. The suggestion referred to leaves out of view the distinction made by the Constitution of the United States between cases in law and cases in equity. And it also fails to recognize the provisions of the Seventh Amendment securing the right of trial by jury in 'suits at common law' where the value in controversy exceeds twenty dollars. That Amendment, so far as it secures the right of trial by jury, applies to judicial proceedings in the Territories of the United States."

Squarely in point, again, is *Killian* v. *Ebbinghause*, 110 U. S. 568, 572.

The present case, it is respectfully submitted, is squarely controlled by the foregoing decisions.

(3) As between this petitioner and his landlord, the only issue in this case was whether the landlord was entitled to repossess himself of the premises occupied by the petitioner. Under the Iowa statute, as has been pointed out, the landlord would have been required to proceed by action of forcible entry and detainer, and the petitioner would have had an absolute right to jury trial. Under the New York statutes, the landlord's remedy would have been in ejectment, or its statutory equivalent, summary dispossess proceedings. In either case the action would have been at law, and the parties would have been entitled as a matter of right to trial by jury. Bringing the action in the Federal court did not destroy that right; on the contrary, it could but strengthen it beyond all attack, by reason of the Seventh Amendment. As said in the leading case of *Lewis* v. *Cocks*, 23 Wallace, 466, 470:

> "It is the universal practice of courts of equity to dismiss the bill, if it be grounded upon a merely legal title. In such case the adverse party has a constitutional right to a trial by jury."

And this is so, even if the point is not raised by demurrer, plea or answer, and is not suggested by counsel, and "notwithstanding the defendant has answered the bill, and insisted on matter of title."

Hipp v. *Babin*, 19 Howard, 271, 278;
Lewis v. *Cocks*, 23 Wallace, 466, 470.

VII.

Whether the forfeiture provision of Section 23 of Title II be considered an action of ejectment, or of forcible entry and detainer, or of forfeiture of an estate in lands, or as a penalty for violation of the law—and it can be but one or the other of these—a construction of that provision which abolishes the established jurisdiction of the law courts in respect thereof, and seeks to transfer such jurisdiction to the equity side is violative of Article III, Section 2 of the Federal Constitution, which requires Congress to recognize and maintain the distinction between cases in law and cases in equity.

(1) If the action by a landlord to expel his tenant under the forfeiture provision of Section 23 be considered an action of ejectment,—and this is perhaps its closest equivalent in the books,—it carried with it right of trial by jury. (Section 425 of the New York Civil Practice Act).

Such an action is triable only at law and before a jury in the Federal Courts as well.

Lewis v. *Cocks*, 23 Wall. 466, 470;
Hipp v. *Babin*, 19 How. 271, 276.

(2) If the action be considered one of forcible entry and detainer (as expressly provided in the parent statute in

Iowa), the right to trial by jury is equally clear, both in New York and in the Federal Courts. (*People* v. *Reed*, 11 Wend. 157, 159; N. Y. Civil Practice Act, Sections 1421 to 1428; N. Y. Real Property Law, Section 535).

(3) The absolute right to a jury trial under the New York Constitution is equally clear if the action be considered one of forfeiture. *Colon* v. *Lisk*, 153 N. Y. 188, 194.

Of the rights of a defendant in such a case in a Federal Court, Mr. Chief Justice MARSHALL said, in *The Sarah*, 8 Wheat. 391, 394:

> "In the trial of all cases of seizure, on land, the Court sits as a Court of common law. * * * In all cases at common law, the trial must be by jury."

(4) So, also, if the action is to impose a penalty for violation of the law,—though it is difficult in the utmost to see how the action can possibly be so construed, since it is not an action of debt to mulct the defendant pecuniarily in an ascertained or ascertainable sum provided by the statute. If the action is for the recovery of a money penalty only, Section 425 of the Civil Practice Act, quoted above, governs; and as to penalties and forfeitures generally, see *Colon* v. *Lisk*, *supra*, 153 N. Y. 188.

The same thing is necessarily true in the Federal Courts, since the action is either in debt or *quasi*-criminal.

> *Boyd* v. *United States*, 116 U. S. 616, 634;
> *United States* v. *Chouteau*, 102 U. S. 603, 611;
> *Lipke* v. *Lederer*, 259 U. S. 557, 561.

(5) We have limited our consideration to these four possible interpretations of the statute, because it is inconceivable to us what other known or definable legal character the action can be given. Clearly the forfeiture provision of Section 23 and the action thereunder have nothing to do with the abatement of nuisances,—in the first place, because the section deals with the abatement of *public* nuisances by

public officials only, and gives no right of abatement to private individuals; and in the second place, because the landlord is not required to prove the continuance of the alleged nuisance at the time of hearing, or any threat or probability or even any possibility of its continuance, and even the voluntary prior abatement of the nuisance is no defense. Equally clear is it that the action is not for the cancellation of the lease, for none of the usual elements of such an action, such as fraud, mistake or accident need be established, but the mere fact of one past violation ("*any* violation") of the statute is sufficient. Furthermore, neither the prayer for relief nor the decree in this case is limited to mere cancellation. The relief asked and given was, on the contrary, typical of actions for the recovery of possession of real property, namely, *ouster* and *repossession*.

VIII.

In view of the established principle that equity will relieve from forfeitures, but will not enforce them, it cannot be supposed that Congress intended to vest courts of equity with jurisdiction to enforce forfeitures under Section 23 of Title II, particularly if the section is to be construed—as, apparently, it was construed by the Trial Court—as depriving the Court of discretion and as being mandatory.

The Realty Corporation was emphatically not in court with clean hands or seeking or offering to do equity. The lease provided that the premises should be used "for a Men's Café and Hotel for Men" (R. 141). The Realty Corporation put the unwarranted interpretation upon this (R. 92) that it "prohibits the use of the leased premises for any purpose other than a hotel and saloon".

Apparently relying upon this misinterpretation of the

lease, the Realty Corporation (R. 92) had refused the petitioner permission even to take out the saloon fixtures and to change the premises into a cafeteria, as he was clearly entitled to do. The Realty Corporation had persistently refused to permit sub-letting of the premises. The uncontradicted evidence established a situation of such a character that even the Trial Court felt (R. 133) that "it is somewhat harsh perhaps to cancel (the lease) absolutely, running, as it does, for a great many years." But it seemed to the Court (R. 93) that "this provision of the statute is *mandatory*"; and the Court did not think (R. 133) that it had any discretion in the matter.

The extraordinary situation is thus presented that this statute is being interpreted so as not only to vest a court of equity with jurisdiction to declare a forfeiture, but, in addition, to deprive the Court of that element of discretion without which it is a sheer misnomer to call the proceeding one in equity.

The earlier rule was absolute and inflexible (*Marshall* v. *Vicksburg*, 15 Wall. 146, 149), that

> "Equity never, under any circumstances, lends its aid to enforce a forfeiture or penalty, or anything in the nature of either."

This rule has been somewhat relaxed; but it is still true that forfeitures are never favored. *Henderson* v. *Carbondale Coal & Coke Company*, 140 U. S. 25, 33:

> "Equity always leans against them, and only decrees in their favor when there is a full, clear and strict proof of a legal right thereto."

The reasons why equity always leans against forfeitures are peculiarly applicable to our case,—

> "because forfeitures are usually harsh and oppressive and because they can ordinarily be enforced at law." (Mr. Justice VAN DEVANTER in *Brewster* v. *Lanyon Zinc Co.*, 140 Fed. 801, 818 [8th C. C. A.]).

Congress must be presumed to have had this classic antagonism against forfeiture in mind when, in enacting this provision of Section 23, it *expressly refrained from vesting jurisdiction of actions thereunder in equity.* On the other hand, if it be contended, nevertheless, that Congress meant to vest equity with this jurisdiction, it cannot be supposed for a moment that it also intended to deprive the Court of that flexibility and discretion which has been called "the beautiful character or pervading excellence, if one may say so, of equity jurisprudence". *Story Eq. Jur.*, Section 439, quoted with approval by Mr. Justice VAN DEVANTER, in *Brewster* v. *Lanyon Zinc Company, supra*, 140 Fed. 801, 819.

In either event, the construction put upon the statute by the courts below was serious error. The question is one of frequent recurrence and grave importance. It merits the first consideration of this Court.

IX.

Section 23 of Title II does not operate retroactively. It does not affect leases made prior to its adoption, and under the Constitution could not affect them.

(1) The petitioner's first lease for the premises was made April 20, 1916. A supplemental lease was entered into July 27, 1916. Both leases were in existence and effect prior to the adoption of the Eighteenth Amendment and before the enactment of the National Prohibition Act.

There is nothing in the forfeiture provision of Section 23 to indicate that Congress intended it to apply to existing leases. This, of itself, is sufficient to take such leases out of the statute.

In *Shreveport* v. *Cole*, 129 U. S. 36, 43, this Court said, by Mr. Chief Justice Fuller:

> "Constitutions as well as statutes are construed to operate prospectively only, *unless, on the face of the instrument or enactment, the contrary intention is manifest beyond reasonable doubt.*"

In *City Railway Co.* v. *Citizens Railroad Co.*, 166 U. S. 557, 565, this Court said of the statute there under consideration that

> "it certainly should not be construed to act retrospectively or to affect contracts entered into prior to its passage, unless its language be so clear *as to admit of no other construction* * * *. There is always a presumption that statutes are intended to operate prospectively only * * *."

(2) Moreover, a construction of the statute, which makes it applicable to existing contracts, would condemn it as unconstitutional.

If the State of New York had enacted the legislation we are considering, it is not seriously open to dispute that as to existing contracts it would have been held unconstitutional, under the provision of Section 10, Article I, that "No state shall * * * pass any * * * law impairing the obligation of contracts."

Brine v. *Insurance Company*, 96 U. S. 627;
Barnitz v. *Beverly*, 163 U. S. 118, 122;
In re Ayers, 123 U. S. 443, 504;
State Tax on Foreign Held Bonds, 15 Wallace, 300, 320.

In the last cited case, this Court said, Mr. Justice Field writing:

> "A law which alters the terms of a contract by imposing new conditions, or dispensing with those expressed, is a law which impairs its obligations. * * *."

In *In re Ayers*, 123 U. S. 443, 505, this Court said:

> "In the case of contracts between individuals, the remedies for their enforcement or breach, in existence at the time they were entered into, are a part of the agreement itself, and constitute a substantial part of its obligation. *Louisiana* v. *New Orleans*, 102 U. S. 203. That obligation, by virtue of the provision of Article I,

> Section 10, of the Constitution of the United States, cannot be impaired by any subsequent state legislation. *Thus, not only the covenants and conditions of the contract are preserved, but also the substance of the original remedies for its enforcement.*"

(3) It is no answer to this difficulty to say that the act we are considering is an Act of Congress, and that Article I, Section 10, applies only to the States. In enacting this statute, Congress purported to exercise its concurrent power to enforce the Eighteenth Amendment. Otherwise Congress could no more have legislated with respect to the terms of leases and the conditions of their forfeiture than, under its power to regulate interstate commerce, it was able to regulate child labor within the several states. *Hammer* v. *Dagenhart*, 247 U. S. 251. On the other hand, in exercising its power to act within the State, Congress must necessarily proceed within the same limitations which would have governed any State which had itself undertaken such legislation.

It would be monstrous to suppose that Congress has been vested with the powers of the States, without the fundamental restraints which have always accompanied them. And yet this is precisely what must be contended if the forfeiture provision of Section 23 is not only to be sustained as valid legislation, but, in addition, is made to apply to leases executed and in force before the Eighteenth Amendment and before the National Prohibition Act. As said by this Court in *Keller* v. *United States*, 213 U. S. 138, 149:

> "While the acts of Congress are to be liberally construed in order to enable it to carry into effect the powers conferred, it is equally true that prohibitions and limitations upon those powers should also be fairly and reasonably enforced."

X.

The leases in suit were executed April 20, 1916, and July 27, 1916, respectively. The Prohibition Act did not become a law until October 28, 1919.

The Act of Congress limits itself to legislating a new substantive covenant, by way of new ground for forfeiture, into these leases. It says nothing about remedies for breach; and it was not intended to, and does not, disturb the limitations contemplated by the parties when they executed these leases.

Parties to a contract procure rights thereunder, of coordinate importance, to both the affirmative obligations of the contract and to the mode of enforcement in existence when the contract is made.

Brine v. *Insurance Company*, 96 U. S. 627, 637;
Barnitz v. *Beverly*, 163 U. S. 118, 122.

Manifestly Congress was legislating only with respect to the affirmative obligations imposed by leases, and not at all with respect to the mode or procedure for their enforcement. The forfeiture provision of Section 23 is silent as to remedies for its breach. There is nothing to indicate that Congress intended to affect the mode of enforcement in any manner whatever.

XI.

If the forfeiture provision of Section 23 of Title II can be construed as a criminal penalty for violation of the law, it is unconstitutional under the prohibition against excessive fines and cruel or unusual punishment. At least its application to the present case is unconstitutional for this reason, for it imposes a penalty of $250,000.

An officer of the United States Government who uses his position for the purpose of extortion, is subject to a maximum fine of $500.

A member of Congress who takes a bribe for procuring a contract, etc. is liable to a fine of not more than $10,000. An officer who knowingly makes a false acknowledgment may be fined not more than $2,000.

A fine of $5,000 is imposed for falsely making, forging, counterfeiting, or altering letters patent granted or purporting to be granted by the President of the United States.

Conspiracy to commit an offense against the United States is punishable by fine of not more than $10,000.

If the forfeiture provision of Section 23 can be considered a fine for violation of the National Prohibition Act, this petitioner has been fined $250,000. There is no reason under the forfeiture provision why the fine may not be several times that amount, for only the accident of the value of this lease limited the mulct to $250,000. "It is to be remembered that the question (of constitutionality) is to be determined not by what has been done under (the Act) in any particular instance, but by what may be done under and by virtue of its authority." (*Colon* v. *Lisk*, 153 N. Y., at p. 194.)

Of such a statute the aptest possible comment is the lan-

guage of this Court in *Weems* v. *United States*, 217 U. S. 349, 366, *et seq.*:

> "Such penalties for such offenses amaze those who have formed their conception of the relation of a state to even its offending citizens from the practice of the American commonwealths, and believe that it is a precept of justice that punishment for crime should be graduated and proportioned to offense."

In that case a comparison was made by this Court between the penalty before the Court and penalties for other offenses; and it was said (p. 381):

> "And this contrast shows more than different exercises of legislative judgment. It is greater than that. It condemns the sentence in this case as cruel and unusual. It exhibits a difference between unrestrained power and that which is exercised under the spirit of constitutional limitations formed to establish justice."

XII.

The lack of jurisdiction of the Trial Court to try an action under the forfeiture provision of Section 23 of Title II was clearly raised and incorrectly decided. Even, however, if the point had not been suggested in any manner, it was the duty of the Court *sua sponte* to recognize it and give it effect, and to dismiss the Realty Corporation's cross-bill for lack of jurisdiction.

While this action was still pending on the calendar and before trial, petitioner moved for trial by jury (fol. 70); but his motion was denied by the Court (fol. 123). At the trial, petitioner objected to the admission of any evidence in support of the Realty Corporation's cross-bill (fol. 378), but was overruled and duly excepted. The petitioner raised the point again at the end of the entire case, but was again overruled by the Court (fol. 600, *et seq.*).

Moreover, it was apparent on the face of the bill that the action was not properly triable in equity. Hence, the Court should, of its own motion, have sent the action to the law side for trial before a jury, or dismissed the bill without prejudice.

In *Lewis* v. *Cocks*, 23 Wall. 466, 470, this Court held that an action of ejectment would have been an adequate remedy for the complainant, and directed dismissal of the bill for that reason. Mr. Justice SWAYNE said:

> "In the present case the objection was not made by demurrer, plea, or answer, nor was it suggested by counsel, nevertheless if it clearly exists it is the duty of the court *sua sponte* to recognize it and give it effect."

In *Hipp* v. *Babin*, referred to by Mr. Justice SWAYNE (19 How. 271, 276), it appeared that the jurisdiction of the court had been admitted during a litigation of more than ten years, and that no objection to the jurisdiction was raised by the pleadings or on the argument of the case in any court. Nevertheless, this Court affirmed a decree dismissing the bill, because the action was (p. 277) "in substance and legal effect, an ejectment bill." The Court quoted as applicable authority Section 16 of the Judiciary Act of 1789, now Section 267 of the Judicial Code, with only an immaterial change of a few words:

> "Suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate, and complete remedy may be had at law."

And the obligation upon the Federal Court to take cognizance, of their own motion, of the fact that the action is not properly in equity, is now embodied in Rule 22 of the New Federal Equity Rules, as follows:

> "If at any time it appear that a suit commenced in equity should have been brought as an action on the law side of the court, it shall be forthwith transferred to the law side and be there proceeded with, with only such alteration in the pleadings as shall be essential."

CONCLUSION.

The judgments of the Circuit Court of Appeals and of the District Court should be reversed and the cross bill of the respondent Pall Mall Realty Corporation for forfeiture and cancellation of the lease of the petitioner dismissed.

Respectfully submitted,

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